96-117

ADMINISTRATIVE LAW JUDGE SYSTEM

HEARINGS

BEFORE THE

SUBCOMMITTEE FOR CONSUMERS

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

ADMINISTRATIVE LAW JUDGE SYSTEM

Serial No. 96–117

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ADMINISTRATIVE LAW JUDGE SYSTEM

THURSDAY, SEPTEMBER 4, 1980

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE FOR CONSUMERS,
Washington, D.C.

The subcommittee met, at 9:30 a.m. in room 235, Russell Senate Office Building, Hon. Howell Heflin presiding.

OPENING STATEMENT BY SENATOR HEFLIN

Senator HEFLIN. The committee will be in order.

Today marks the first day of hearings by the Consumer Subcommittee on the administrative law system ALJ. This is an issue of great interest to me, having had extensive experience with reform of the State judicial system.

The Commerce Committee has been active recently with legislation which reduces regulatory economic restraints administered by agencies under our jurisdiction. The committee has held extensive oversight hearings on these agencies as well as on the consumer protection regulatory activities of the agencies. As a result of these committee endeavors, questions arose as to the effect of deregulation on the ALJ system as well as the effectiveness of the current system.

According to a questionnaire which Chairman Cannon recently sent to all our agencies, over 109 ALJ positions exist for 8 regulatory departments and agencies under the committee's jurisdiction. During the oversight process, the committee received testimony on the question of the independence of the ALJ. We want to investigate in these hearings whether independence is a problem either in appearance or reality with our agencies. This raises two interrelating concerns: The first is the public's perception of the legitimacy of adjudication, and the second involves competence and the criteria used in evaluating competence.

As I listen to the testimony this morning, I will be seeking information to answer these questions: (1) How is the system working; (2) Will the current regulatory reform bills change the system; and (3) Would a different structure better serve the process. I hope that these hearings will serve as a basis for further examination of these issues.

The first witness is Stephen Babcock, Executive Director of the Administrative Conference of the United States, accompanied by Mr. Jeff Lubbers and Mr. Richard Berg.

STATEMENT OF STEPHEN L. BABCOCK, EXECUTIVE DIRECTOR, OFFICE OF THE CHAIRMAN OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES; ACCOMPANIED BY RICHARD K. BERG, EXECUTIVE SECRETARY; AND JEFFREY S. LUBBERS, SENIOR STAFF ATTORNEY

Mr. BABCOCK. Thank you, Mr. Chairman. We are pleased to be here this morning, and we hope we will be able to give you an overview of the administrative law judge system, which will help you and the committee staff in answering the questions you have referred to.

My name, as you have said, is Stephen Babcock, and I am the Executive Director of the Administrative Conference of the United States. On my right is Richard Berg, our executive secretary; and on my left is Jeffrey Lubbers, senior staff attorney.

As you know, the Conference does not now have a Chairman, or else he or she would be presenting our testimony. But a Presidential nominee is now awaiting Senate confirmation.

First, let me provide you with a little background about our agency. The Administrative Conference is an independent Federal agency whose mission is to recommend improvements in the administrative procedures used by all Federal departments and agencies. The Conference was established in 1964 to assist the agencies and the Congress in developing procedures that provide greater fairness and expedition for participants in the administrative process, more effective attainment of agencies' goals, and lower costs for taxpayers.

The Conference has 91 members, and it takes formal positions only through these members' votes at semiannual plenary sessions. All of these members, except for the Chairman, all of the remaining 90 are volunteers, and they give their time to the work of the Conference without any compensation. Forty-nine of our members are from within the Federal Government, members of independent agencies, including those under the jurisdiction of this committee, general counsels of departments, and the like. And 41 are from outside the Government: distinguished academics and attorneys engaged in private practice.

We are from the Office of the Chairman, a body of 20 staff members whose job is to support the work of the membership. I wish to note that the views we are expressing today are the views only of the Office of the Chairman and not necessarily those of the full body.

With that commercial, as it were, over, let me turn to the substance of our hearings today. We have been asked to provide the committee with an overview of the history of the role of the administrative law judge in the administrative process, with a general perspective on the structuring of the judicial and prosecuting functions involved in the administrative implementation of a statutorily established program, with a special emphasis on the need for greater or lesser independence for the administrative decisional officials, and for our views on pending bills that would establish a system for evaluating the performance of administrative law judges.

First I will discuss the history of the administrative law judge establishment. The expansion of New Deal agencies had created

serious concerns about the power and fairness of the so-called headless fourth branch of the Government. And these worries occasioned a succession of studies with sharply divergent views on how to control the agencies. For example, let me quote from a 1932 scholarly work on the Federal Establishment:

> Uncle Sam has not yet awakened from his dream of Government by bureaucracy, but ever wanders further afield in crazy experiments in State socialism. Possibly, some day he may awaken from his irrational dreams and return again to the old conception of Government as wisely difined in the Constitution of the United States.

This was a kind of populist notion that the Government was out of control, and it represents the same kinds of concern with the bureaucracy that are really very contemporary.

In 1934 the American Bar Association—ABA—also reported that: "The judicial branch of the Federal Government is being rapidly and seriously undermined." The committee which was reporting "naturally concludes that so far as possible, the decision of controversies of judicial character must be brought back into the judicial system." In other words, the American Bar Association was seriously concerned that the administrative judiciary was getting out of control, and that these disputes ought to be resolved under the court system.

There were, as well as these kinds of concerns, a series of court cases which held that administrative agencies were not giving adequately judicialized attention to the controversies before them. The reviewing courts naturally looked to the judicial model and were concerned that the administrative agencies' procedures were not sufficiently fair and precise, that the decisional officials were not confining themselves to the record and so forth.

All of this resulted in the passage of the Administrative Procedure Act—APA—in 1946. And with respect to hearing examiners, as the administrative law judges were then called, there were three problems which the APA was attempting to correct: First, these officers were sometimes chosen on an ad hoc basis, and some persons thought that some of them, at least, were not competent. Second, the role of the presiding officers in an agency's decisional process was often unclear; the agencies would sometimes ignore the officer's decision, which naturally upset the parties, and enter their own de novo decision on review. Third, it was thought that the judges, or hearing examiners, as they were then called, were not sufficiently independent of agency control so as to be able to find facts fairly.

And I want to stress that the latter concern was with their factfinding ability, because we will get later on into the distinction between the administrative law judges as factfinders and administrative law judges as determiners of the law of the agency.

Now the APA, as to the independence issue, attempted to correct the problem by lodging in the Civil Service Commission, now the Office of Personnel Management, exclusive authority for the initial examination and certification for selection of administrative law judges; in addition, it provided that they should receive their compensation only as prescribed by the Office of Personnel Management; third, that they can be removed by the agency that employs them only after good cause is established. Now that good cause

must be established before the new Merit Systems Protection Board, which was established by the Civil Service Reform Act.

The act also prescribes that a judge may not be responsible to or subject to supervision by anyone performing investigative or prosecutorial functions for an agency. This separation-of-functions requirements is designed to prevent the investigative or prosecutorial arm of an agency from controlling a hearing or influencing the judge.

Finally, to insure that the administrative law judge is well insulated from improper agency pressures and controls, the APA contains two other provisions designed to make the administrative law judge at least semi-independent of the employing agency: Judges are to be assigned to their cases in rotation so far as practicable; and they may not perform duties inconsistent with their role as administrative law judges.

There were 200 judges in 1964 at the time of the passage of the Administrative Procedure Act, and now there are well over 1,100. We have recently released a book entitled "Federal Administrative Law Judge Hearings; Statistical Report for 1976–78," which gives the breakdown by agency of judges and cases.

We have attached two summary pages to our testimony which will give you some idea of where the judges are employed and how many cases they decide. Over 700 of the judges are employed by the Social Security Administration. A total of over 300 at the present time are in 4 other agencies: the National Labor Relations Board, the Department of Labor, the Interstate Commerce Commission, and the Occupational Safety and Health Review Commission. The remaining 24 agencies average only about 7 judges per agency.

The Office of Personnel Management, through its Office of Administrative Law Judges, now administers the recruitment, evaluation, and selection system of those eligible to be appointed as administrative law judges. It conducts interviews, administers a test of writing ability, evaluates the qualifying experience of all applicants who meet the minimum experience requirements; and it scores each of them on a scale of 100 points.

This complex system, as I said before, was designed to correct the fears of those in the 1940's that the hearing examiners were being selected on an ad hoc basis, and that not all of them were competent.

There is one major factor in the selection process which I would like to mention, which is veterans' preference. The Administrative Conference has long favored the elimination of veterans' preference as applied to the selection of these highly qualified administrative law judges. We feel that this prevents women and minorities—especially women—from qualifying and that the elimination of veterans' preference would assist in obtaining even more highly qualified judges than the present system permits.

Now let me turn to the second portion of our testimony, concerning the decisional independence of administrative law judges.

In the 1940's a number of students of the administrative process, including a minority of the Attorney General's Committee, felt that the judging function should be entirely outside the administrative agencies, given the investigative and prosecuting functions of those same agencies. This complete separation was thought neces-

sary to insure the independence of the administrative law judges. This is a consideration of particular importance in those proceedings of an accusatory nature, involving an asserted violation of a statute or regulation.

The institutional resolution of this question embodied in the Administrative Procedure Act, however, was to require separation within an agency of the judging function in formal administrative proceedings. The procedural safeguard that the APA provides is that the employees of the agency involved in prosecuting or investigating a case may not consult off the record with the administrative law judge who is hearing the case.

An institutional safeguard that the APA provides is the requirement that the judges not be subject to the supervision or direction of any agency employee who is engaged in the performance of investigative or prosecuting functions. As a practical matter, this means that the agencies' administrative law judges must be placed in an organizational unit separate from the operating branches of the agency responsible only to the head of the agency. Thus, at the politically responsible agency-head level, and only there, are the lines of review and control for prosecuting and judging functions merged.

There are a number of structural variations on this basic Administrative Procedure Act model. One is at the National Labor Relations Board, where the General Counsel is an independent entity, and he, independently of the members of the Board, determines which cases to prosecute. The judges, of course, work for the Board itself, and here the structure is that the prosecutor is independent, and the policymakers and reviewers of the judges' decisions are in one unit with those judges.

Another variation—an interesting one, I might say—is under the Occupational Safety and Health Act. The Occupational Safety and Health Administration in the Department of Labor sets policy to implement the OSHA act and controls the activities of the investigators and enforcers of that act. The judging function, however, is performed within a separate entity called the Occupational Safety and Health Review Commission.

This same model was followed again in 1977 for the Mine Safety and Health Administration, also in the Department of Labor, which must bring its violations cases before an independent entity called the Mine Safety and Health Review Commission.

There is a third model. That is to free the administrative law judges entirely from the control of single agencies by creating a separate corps of administrative law judges—this model, of course, doesn't exist, but it is one that has often been suggested as far back as the late 1930's—setting up, in effect, a separate corps of administrative law judges who would be just as independent of the Federal agencies as are Federal judges at the moment.

A fourth model would be to eliminate review by an agency of certain administrative law judge decisions. Thus, the judge would not be susceptible to influence by any body of persons who was also given the responsibility of setting policy for the agency.

The Administrative Conference has never urged that the institutional separation function should be carried farther than the model set forth in the Administrative Procedure Act. The Administrative

Conference has thought that the security of the administrative law judges' tenure, and their separation from the operating branches of the agencies, give them sufficient independence to insure impartiality in the conduct of proceedings and independence in factfinding.

On the other hand, the OSHA–OSHRC model, to take one example, creates a diffusion of responsibility in the implementation of the agency's program, which creates considerable confusion in the courts and in the minds of the public over who is in charge.

A study done for the Administrative Conference which was published in 1979 indicated that there had been significant disagreements between OSHA and OSHRC over their respective roles in construing the statutes and regulations of the Department in this area.

And I might add, a recent case of this came to my attention yesterday. This kind of administrative confusion continues. In the case of *Marshall* v. *Sun Petroleum Products Co.*, which the court of appeals for the third circuit decided May 29, 1980, the question arose as to whether the Secretary of Labor could withdraw a settlement which had been reached between the Secretary of Labor's attorneys and the defendant after the case had been assigned to an administrative law judge at OSHRC.

The facts were quite complicated, and I think they well illustrate the difficulties you get into when you separate out the adjudicative functions from the policymaking and enforcing functions in an agency. The Secretary and the defendant couldn't agree on an alleged violation, and the case was assigned to OSHRC. Thereafter, they entered into a settlement. A union objected to the settlement. The case was heard by an administrative law judge who decided that the settlement was fair, and then OSHRC decided to review it. At that point, the Secretary of Labor decided he didn't like the settlement after all. I am not sure why this was so, but the inference is that perhaps he thought the union had a point, and so he sought to withdraw the case from OSHRC and take it back to renegotiate the settlement.

OSHRC held that he could not do that, but, because the two members of OSHRC couldn't agree, the administrative law judge's decision was allowed to stand. And it went up to the court, and there you had a majority opinion which discusses the almost amusing confrontation between the Department of Justice and the Department of Labor. Justice was in there representing OSHRC, defending OSHRC's decision. And the Secretary of Labor was arguing that OSHRC had no right to representation in the court of appeals, any more than a lower court has its own attorneys defending its decision when it goes into a higher court.

And the court spent most of its labor deciding that, "No, OSHRC does not have a right to representation in the courts of appeals." And the representation of the Department of Justice was ordered stricken. In fact, they even took the names of the attorneys off of the appearance list in the front of the case.

And then the decision went on to say that under certain complicated circumstances that I won't go into, the Secretary of Labor does have the right to withdraw a case after it is heard by an administrative law judge but before it has been reviewed by OSHRC but not afterwards, and in certain other circumstances he can withdraw a case before it has been heard by an administrative law judge but after it has been formally referred to OSHRC.

Now, these kinds of disputes have continued over the years, and I think they are almost inevitable in this kind of a system. That is our problem, basically, and we suggest that this model should be considered carefully before it is extended to other areas, such as the fair housing review situation, which I understand you are considering at the moment.

And that situation, I might add, would be even more troublesome, in that under the proposed legislation, at least as we understand it, the administrative law judge's decision would be reviewed by a body consisting of only one of the three fair housing review commissioners and two administrative law judges selected by rotation. So you wouldn't even get consistency in the decisions of the Commission, because they wouldn't really be the same three commissioners hearing the cases all the time.

The problems with the administrative law judge unified corps concept are that the efficiencies now resulting from administrative law judge specialization would be lost, at a time when there is an almost universal call to make Government leaner and more efficient. I think that such a despecialization of functions, which the creation of the unified corps would entail, should be generally adopted only if the most careful weighing of available alternatives and relevant experience convinces you that it is both necessary and worth this cost.

I see my time is about to run out, and I will go very lightly over the last portion of our testimony, which is our views on pending legislation. These have all, I might say, been presented before to the various committees who are considering these bills, and we will be, pleased to make our testimony on those bills available to you and to your staff.

On recruitment and selection, the Conference has expressed itself as preferring that administrative law judge recruitment and selection not be transferred to the Conference, as the members fear that these day-to-day administrative activities would impair our performance of our existing mission. Veterans' preference, as I indicated before, is something which the Conference has long recommended be eliminated. S. 262, one of the reform bills, would accomplish this, while the House bill, H.R. 6768, would not.

We have not taken a position on the question of the limited terms. We would suggest that much of what is intended to be accomplished might just as well be accomplished by establishing a good ALJ evaluation system.

We do believe that there is a need for a performance appraisal system, and I might again say that this is the view only of the Office of the Chairman, really, of the three of us here—but that is almost a majority of us, so I guess that counts.

But we do believe that there is a need for a performance appraisal system, and we think that the problems that some have alleged with some few administrative law judges can be cured that way, without going to the more—how should I say it—more substantial modification than the present system that a term would entail. We have commissioned a study by Prof. Victor Rosenblum on how a performance appraisal system would work. He will also be testifying here. And you might want to ask some questions of him on that point.

We can only note that several systems of this kind do exist at the State level, although experience is quite limited at this point. So, if

the Conference is assigned the task of evaluting administrative law judges, we will have to start from scratch and figure out a systematic and fair way of doing it.

That is the conclusion of our prepared testimony. We would be pleased to answer any questions that you might have for us.

[The attachment referred to follows:]

APPENDIX 1.—TESTIMONY OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SEPTEMBER 4, 1980

AGENCY ADJUDICATIVES CASELOADS—FISCAL YEARS 1975–78

Agency	1975		1976 & T.Q.		1977		1978		Final pending
	New	Closed	New	Closed	New	Closed	New	Closed	
Agriculture	251	191	293	269	244	250	247	260	120
AT&F	61	41	124	95	165	129	96	88	57
CAB	79	74	111	108	58	69	93	79	103
CFTC[3]	—	—	37	8	292	97	336	206	414
CPSC	3	0	23	14	7	8	4	9	7
DEA	N.A.	N.A.	53	40	35	45	31	40	11
EPA[5]	242	85	208	87	183	128	104	166	304
FCC	172	131	141	142	186	93	127	58	353
FERC[6]	274	177	283	228	155	216	137	125	390
FMC	57	53	98	74	100	100	88	110	103
FMSHRC[4]	—	—	—	—	—	—	2,147	1,579	1,743
FTC	61	41	54	58	15	32	17	36	72
FDA	—	—	4	2	6	4	3	1	9
HUD	N.A.	N.A.	272	245	213	225	131	182	49
Interior[7]	4,353	9,782	3,685	6,885	1,942	2,960	1,513	1,176	413
ICC[8]	1,313	1,154	807	934	1,044	2,006	1,371	1,692	1,694
Labor[9]	1,134	884	1,773	1,589	2,277	1,687	2,560	2,167	1,950
Black lung[9]	—	—	—	—	1,879	988	209	1,051	1,039
Maritime Administration	5	*4	19	12	20	19	19	14	35
NLRB[10]	3,345	3,469	5,185	4,589	4,902	5,406	5,378	5,081	**2,642
NTSB	577	665	778	831	562	597	568	586	256
NRC	39	27	18	18	20	14	10	13	96
OSHRC[11]	2,513	2,513	3,950	3,100	3,311	3,843	4,331	3,777	N.A.
SEC	77	114	85	127	69	98	30	54	127
SSA[13]	154,945	**111,000	203,106	236,000	193,657	191,000	196,428	209,000	83,131
U.S. CSC	5	10	11	7	16	14	27	14	22
U.S. Coast Guard	**571	553	651	620	683	648	681	657	249
U.S. ITC	—	—	11	3	8	9	24	10	21
U.S. Postal Service	160	127	251	251	113	200	133	100	52
Total	170,237	131,095	222,031	25,336	212,102	210,885	216,843	228,331	95,462
Total, other than SSA	15,292	20,095	18,925	20,336	18,445	19,885	20,415	19,331	12,331

[1] Created in 1975. No case reports for 1975. Case-closed figures are the sum of closed cases at ALJ and Commission levels.
[2] Case-closed figures reflect activity in ALJ stage only.
[3] Succeeded the Federal Power Commission in 1977. FY 1975 figures are revised.
[4] Created in March 1978. Figures given are from March 9 to September 30, 1978, and reflect activity in the office of ALJ's only. Cases transferred from the Department of the Interior are not counted as new cases but are reflected in the pending figure.
[5] Figures reflect activity at ALJ stage only. The pending figure does not include the 1,528 cases under the Coal Mine Health and Safety Act that were transferred to FMSHRC. It also does not include Indian probate cases (approximately 2,000 per year) which are not subject to the APA and are heard by special hearing officers, but are otherwise similar to ALJ cases.
[6] Some 1976 data from ICC are missing. Totals for that year are probably too low.
[7] Figures reflect estimated totals for Fair Labor Standards Act cases.
[8] Until 1977 black lung cases in the Department of Labor were not heard by fully-qualified ALJs.
[9] 1975 cases do not include contract appeal cases, approximately 10 per year.
[10] NLRB case-closed figures are derived similarly to those of other agencies, although the NLRB does not consider some cases closed until Federal court action is final.
[11] The NLRB pending figure is for cases pending in the office of ALJs only. Another 500 cases were probably pending at Board level.
[12] 1976 figures are estimates.
[13] SSA case-closed figures in this table were determined as follows. We know the number of cases decided by ALJs and by the Appeals Council, but we do not know the exact number of cases that were terminated (were unappealed) at the ALJ level. For the period fiscal year 1976–78, there were 631,626 dispositions by ALJs and 161,949 new cases at the Appeals level. Therefore a rough estimate is that 74.36% of all ALJ dispositions represent final agency action. Thus we can arrive at an equally rough estimate of total SSA terminations by adding 74.36% of the ALJ terminations to The Appeals Council terminations for each year, and rounding off.
[14] SSA figures for fiscal year 1975 were adjusted to include Supplemental Security Income cases which, until 1976, were not decided by regularly appointed administrative law judges. Therefore the fiscal year 1975 figures are higher than the figure given in the table (page 22) of our 1975 Statistical Report.
[15] Coast Guard 1975 new-case figure is an estimate.

DEFINITIONS

Except as otherwise noted, the following definitions apply to the terms used in this report.

New Cases: Formal proceedings (including a few formal rulemakings) referred to an agency's office of ALJ's during the year, regardless of whether the case actually went to hearing. Cases disposed of prior to referral to the office of ALJ's are not counted.

Closed Cases: Cases in which final agency action was taken during the year (either by agency head or by unappealed ALJ decision).

Pending Cases: Cases which have reached the stage of referral to the Office ALJ's, but remain in the pipeline pending final agency action at the close of the reported fiscal year.

T.Q.: Transition quarter (July–September 1976), when the fiscal year was changed to start October 1. Counted as part of fiscal year 1976.

N.A.: Statistics are *not available*. Where a case category did not exist during a part of the reporting period, a dash (—) is used instead.

Appendix 2.—Testimony of the Administrative Conference of the United States, September 4, 1980

NUMBER OF ADMINISTRATIVE LAW JUDGES SERVING, BY AGENCY

Agency or Department	Number of ALJ's	
	January 1979[1]	June 1980[2]
Agriculture, Department of	5	5
Alcohol, Tobacco and Firearms, Bureau of (Dept. of the Treasury)	1	1
Civil Aeronautics Board	17	11
Commodity Futures Trading Commission	4	4
Consumer Product Safety Commission	1	[3]0
Drug Enforcement Administration (Dept. of Justice)	1	1
Environmental Protection Agency	6	7
Federal Communications Commission	14	13
Federal Energy Regulatory Commission	23	22
Federal Labor Relations Authority	4	[4]10
Federal Maritime Commission	7	7
Federal Mine Safety and Health Review Commission	12	18
Federal Trade Commission	2	12
Food and Drug Administration (Dept. of H.E.W.)	1	1
Housing and Urban Development, Department of	1	1
Interior, Department of the	8	[5]13
Interstate Commerce Commission	61	55
Labor, Department of	49	66
Maritime Administration (Dept. of Commerce)	3	3
Merit Systems Protection Board	1	[6]1
National Labor Relations Board	98	115
National Transportation Safety Board	6	6
Nuclear Regulatory Commission	1	1
Occupational Safety and Health Review Commission	47	48
Postal Rate Commission	0	[7]0
Securities and Exchange Commission	8	7
Social Security Administration (Dept. of H.E.W.)	660	698
U.S. Coast Guard (Dept. of Transportation	16	16
U.S. International Trade Commission	2	2
U.S. Postal Service	2	2
Total	1,070	1,146

[1] Data derived from "Management Improvements in the Administrative Law Process: Much Remains to be Done", Report by the Comptroller General of the U.S., FPCD–79–44, May 23, 1979 (Appendix III).
[2] Information obtained from Office of Administrative Law Judges, OPM, June 1980.
[3] Position is temporarily vacant due to a retirement.
[4] The FLRA was created in 1979 by the Civil Service Reform Act.
[5] Does not include 11 GS–14 Indian Probate Judges.
[6] The MSPB was created in 1979 by the Civil Service Reform Act. This position was formerly located in the Civil Service Commission.
[7] The position allotted to the Postal Rate Commission has been vacant since 1977.

Senator HEFLIN. Does the Administrative Conference have an educational program or an orientation program for administrative law judges on a continuing judicial education program?

Mr. BABCOCK. Some years ago, we commissioned the preparation of a manual for administrative law judges, which is widely used. And it's odd that you should ask that question. The author of that manual called me up 2 days ago and asked to come in, and we made an appointment for next week to discuss a possible revision of that manual.

We conduct no systematic program for education of administrative law judges. There is such a program, conducted by the judges themselves. A school. Reno, Nev., is where it happens to be located. And I think anything we did therefore would be duplicating something that's already being done.

The CHAIRMAN. That's a very fine school, if I might add.

Senator HEFLIN. I don't suppose its location adds to its quality.

The CHAIRMAN. I'm sure it adds to it, but it is an excellent school, and I am speaking out there next month.

Senator HEFLIN. Is that operated with Federal funds? Or is it an independent body? Is that in connection with the National College of the Judiciary?

Mr. LUBBERS. I think it is. I think it is a privately funded group.

Senator HEFLIN. Is it a matter of voluntary attendance?

Mr. LUBBERS. Yes, it is voluntary, but most of the agencies encourage their judges to attend where possible.

Senator HEFLIN. Do you have any figures as to what percentage attend?

Mr. BABCOCK. No, we don't. I'm sure some of the administrative law judges who will be testifying will be able to give you more information on that.

Senator HEFLIN. Well, we have gone through, in particular in this committee, deregulation. This affects the way the judges will operate in the administrative agencies. A particular analogy could be drawn to the adoption of the Federal Rules of Civil Procedure. There was a long period of transition for Federal judges and State judges, after the adoption of the new rules during which time the judges learned the new system. That transition can be detrimental to the concept of the new ideas, whether it be the ideas of the Federal Rules of Civil Procedure or whether it be deregulation.

There are numerous phases of deregulation which, in my judgment, will call for the administrative law judge to be educated. My observation has been that a voluntary type of judicial education may not be successful. The federal system on district court judges a long time ago realized that continuing education must be mandatory. There is an orientation program for all of the new district court judges, as well as mandatory continuing judicial education program.

Going into deregulation, in my judgment, is going to be a traumatic experience for numerous administrative law judges. I don't know whether there is an authorization for your Conference, but this, to me, may be something that is needed. The administrative law judges will be going through a period of transition in which there will be a great deal of confusion that could be eliminated. That, of course, applies to the agencies and departments which will be going through deregulation.

Mr. BABCOCK. Let me comment on that, Senator. Of course, under the APA model, the administrative law judge is supposed to be an independent factfinder. He is not supposed to be an independent interpreter of his agency's organic act. And the deregulation notions, as expressed in either changes of policies in agency decisions, or as expressed in new legislation coming from this committee, ought to be interpreted by the agency heads. And, under the existing theory, the judges are supposed to follow those interpretations.

It's been my observation that clearly some of the older judges, especially, who have been in the regulatory agencies for many, many years, have tended to resist some of the new deregulation ideas.

And third, let me comment that the Administrative Conference is very interested in the whole idea of, "How do you get from here to there in deregulation?" And we will be asking in our budget submission, which goes in tomorrow, for some money to conduct a study of the experience in transportation deregulation, because we think there may be very interesting and important things for the Government to learn from this experiment.

Senator HEFLIN. Well, you are correct that policy should be interpreted by the agency heads. But if, for example, the burden of proof changes due to a new legislative mandate for an agency, this would relates itself to factfinding.

Mr. BABCOCK. Yes. That is a very good point. And there are certainly analogies in the deregulation legislation.

Senator HEFLIN. I am interested in your statement on veterans' preference. That is a strong political issue. Has any consideration been given to the concept of a transitional preference for minorities and women?

Mr. BABCOCK. In the context of administrative law judges, we are not aware of that yet being in any bill. I recall being asked on the House side what the Office of Administrative Law Judges was doing to encourage—to attempt to recruit more women and minorities, and my answer there was that I knew they were very seriously concerned with the problem, because I was on the interagency committee which selected the new, and very competent, I might say, head of the Office of Administrative Law Judges, and all the candidates were asked that question.

I had not heard of the idea of giving points on the examination to women and minorities. I might say that I think the problem, as

it is reported to me, is not so much that the ones that they can find don't score high enough, but that they simply can't find any who are interested who are even remotely qualified; that they seem to think that what they need is greater outreach to get the people interested, not to give them points once they get interested.

However, that is just an off the top of my head reaction.

Senator HEFLIN. Well, I gather from the reports coming to me from my staff behind me, and other places, that they would differ with you as to the accuracy of the statement that they are not available. I think we are in a transitional period. I think that the concept of affirmative action, or the idea of minorities and women being sought out for administrative law judge positions, is a concept that ought to be explored.

The veterans' preference is not a quota basis, and it has pretty well been held to be valid. It may well be that some consideration could be given on that basis.

Mr. BABCOCK. Well, far be it from me to quarrel with your staff, as I am sure that their information is far better than mine, on this point. I might say that if you thought that——

Senator HEFLIN. Well, I don't always find that true.

Mr. BABCOCK. Well, I have not dealt with all of them, but for those that I have dealt with, I'm sure it would be true.

But I might say that if you had something like that in mind, I am sure you'd have to proceed by statute because of constitutional equal protection problems.

Senator HEFLIN. There certainly has been a movement from the original concept of hearing examiners moving more toward independence.

I'm not real sure that the premise that we started with is sound today—the premise was that basically an administrative agency was the policymaker, while the adjudicator, the administrative law judge or the hearing examiner, was supposed to be the arm of the agency. More and more we are getting complaints of agencies being the investigator, the instigator, the grand jury, the prosecutor, the trial judge, and the trial jury. The administrative law judge system has expanded to the point where there are far more administrative law judges than there are U.S. district court judges. The volume of adjudications in the administrative system far exceed the judicial system.

There are agency policy principles which change, and these, of course, are of real concern to an agency. The agencies are delegated from Congress to do certain things. So I suppose that the ideal position for the administrative law judge would be some middle ground that insures the independence of that adjudication but at the same time allows the agencies and departments to adopt policies as times change, and as demands are made in their particular fields.

And certainly the movement has been toward giving more independence. But there is a feeling that a great deal more independence is needed. From my observations so far—which are limited—I agree with that reevaluation. My position is not set in concrete, and I intend to study this issue.

Now, I understand that there are agencies where policy is determined in advance, or during the adjudication, and then, instruc-

tions are given to the trier of facts. This seems to be similar to the way a judge would give instructions to a jury. I understand maybe the CAB has something of this nature.

What has been your observation about this, as to the possibilities of an agency giving policy instructions in advance, rather than after the judgment has been made by the administrative law judge?

Mr. BABCOCK. Well, you're not talking about policy by regulations, but policy expressed in the order assigning the case to the administrative law judge?

Senator HEFLIN. Well, in a great number of instances, administrative law judges will make a decision and then the commissioners will review those facts and take the findings of fact and fit them into a policy concept, which in effect takes away somewhat from the independence of the adjudication.

Mr. BABCOCK. Well, the adjudication is not supposed to be, Senator, under this present system, the judge is not supposed to be determining policy. There, the analogy to the judicial model breaks down. His job is to find the facts. And of course, if you look at the social security area, for example, you have claimants coming in, and administrative law judges hearing the case. The person who is assigned to determine whether a claimant has a disability says x, and the claimant disagrees, so the judge hears the case and renders a decision. That is closer to the classical judicial model, because you don't have a question of agency policy intervening.

When you get to agencies like the Civil Aeronautics Board, there is less need for—in theory, for—an administrative law judge, in the first place, to find the facts and to investigate the demeanor of the witnesses. There, his role, I would say, is more a marshaller of the evidence, and an organizer of the evidence into a coherent whole.

You can't evaluate the demeanor of an air carrier. The case is pretty much a written record.

Now, the extent to which the agency can instruct him in advance as to what its current policies are, then that promotes efficiency.

I'm not sure I have answered the question.

Senator HEFLIN. Well, maybe we're not on the same wavelength, but you are in effect saying that the administrative law judge is not a policy finder.

Mr. BABCOCK. That's right.

Senator HEFLIN. Well, neither is a jury.

Mr. BABCOCK. That's right.

Senator HEFLIN. With respect to a jury, a judge in effect, instructs with his interpretation of the law, and his interpretation of the law is subject to a review.

I raise the issue: can an agency instruct in advance the trier of the facts, the administrative law judge, as a judge instructs the jury? On the other hand, should the current procedure be followed, where the trier of fact finds the facts, and then the commissioners take those facts and apply it to the law?

I am not sure there is any merit to this, but I think it is something that ought to be explored. This is a situation where well trained people try the facts. Then a commissioner who has no training in the law, in many instances, and possibly no expertise,

may change the decision. This raises the question: is there a need for a selective evaluation?

I think the concept needs some exploring.

Mr. BABCOCK. Well, let me ask my colleagues and see if they have anything to contribute. But in the case of the Civil Aeronautics Board, to get back to that example, the administrative law judge is really more closely analagous to the jury than to the judge in the traditional judicial concept. Under the system, as it is established, the board members, for better or worse, are supposed to be the judges, of policy, not the administrative law judge.

He is only supposed to call factual shots as he sees them, independently, and without partiality. But he is not supposed to be applying the law, or, let's say, making policy determinations of his own volition, and he is supposed to be following the law as the agency's heads have set it down, and only filling it in interstitially. And this does create problems, because agency membership changes, and if the judges are still following last year's decisions, as they are supposed to—and then, whoops! along comes deregulation—everything is changed.

And it does create tension, there is no question. But it really isn't that much, in that situation, like the traditional judicial model.

Mr. LUBBERS. I would just like to add that in these types of cases where you have complicated economic regulation issues involved, the Senate Governmental Affairs Committee study of a couple of years back showed that the hearing stage was often quite long. So one way of attacking this problem might be to have the policy made more clear at the outset of the hearing, so that the judges know exactly what the agency policies are, and they can find the facts more quickly. So in that sense, it is, in a way, a reform to have the policy set forth in advance of a hearing.

Of course, there's always an opportunity for judicial review in the courts, for the litigants to challenge the agency's policies.

Senator HEFLIN. Senator Cannon has to go to another meeting. Do you want to go to the next panel, Mr. Chairman?

The Chairman. I have just a couple of questions that I could ask now, if I may, Mr. Chairman.

Let's get back to this veterans' preference issue. How much of a problem have you had up to the present time with veterans' preference? Have there been some particular situations where, because of a veterans' preference, you weren't able to broaden the selection range?

Mr. LUBBERS. Let me point out the way veterans' preference works in this context. When the Office of Personnel Management establishes the register of eligibles to be selected by agencies to be ALJ's, they put on the roster those people who have achieved over 80 points on their examination. And the maximum is 100, so you only have a range of 80 to 100. At that point, if the person is a veteran, they add 5 or 10 points: 10 points for disabled veteran, 5 for nondisabled veteran.

So those 5 or 10 points are very important in the context of a 20-point range. If you look at the existing register, almost all the top positions are filled with veterans, so that creates a very strong preference in this context for veterans. Thus, I think the statistics

that the Office of Personnel Management can provide you with show that most administrative law judges appointed in the last 7 or 8 years have been veterans.

The CHAIRMAN. What you're really saying is that would discourage people who were nonveterans from trying to get on the list?

Mr. LUBBERS. We think so.

Mr. BABCOCK. There's no question.

I might say that the Conference recommendation, to our recollection, was based upon this theoretical point, rather than on any particular problem with any particular veteran. It has been a recommendation of the Conference since 1969. It was one of the very early ones.

And I might say that the underlying purpose of the Veterans' Preference Act is to help get those who have served their country back into the mainstream of civilian life.

And when you're talking about administrative law judges, by definition, you are talking about people who already are quite successful. They are assimilated, as it were. They are successful lawyers in the first place. And I question whether there is a need for additional assistance to that kind of person.

And I might say that I am a veteran, and I am not against veterans.

The CHAIRMAN. You indicated some lack of experience under the present retirement situation. How is retirement handled now? Is there any mandatory provision for retirement?

Mr. BABCOCK. No. There is no mandatory retirement provision for administrative law judges.

The CHAIRMAN. So that a person could go on and serve as long as as he wished?

Mr. BABCOCK. That is right, Senator Cannon.

The CHAIRMAN. Was there previously a retirement provision for the ALJ's under the general civil service law?

Mr. BABCOCK. The general civil service provision, which was age, 70 I believe.

The CHAIRMAN. And that is now waived?

Mr. BABCOCK. Yes, sir.

The CHAIRMAN. How long has the current system been operating?

Mr. BABCOCK. We believe about 2 years.

The CHAIRMAN. One of the arguments advanced for limiting the tenure of the ALJ's is to deal with the problem of subpar performance.

On the other hand, as you note, opponents of limited terms argue that it will infringe upon the independence of the ALJ's and that there is a danger that it will politicize the ALJ corps.

Considering the careful screening during the current selection process, do you believe that the problem of subpar performance is so serious or prevalent as to warrant the limitation of tenure?

Mr. BABCOCK. We are not for the limitation of tenure. We do believe that there is a need for an evaluation program, and it is not because the problem is an especially prevalent one. It is just because the position is so important that even one judge who is not performing can throw a monkey wrench into a major regulatory system.

The CHAIRMAN. Now, neither of the legislative proposals, S. 262 and H.R. 6768, have a mandatory removal provision or a termination date. They provide for review, as I understand it.

In other words, the performance would be evaluated at least every 10 years under S. 262. And under H.R. 6768, the performance would be reviewed at least once every 6 years.

But let's say that the performance were reviewed and were found to be subpar, what happens then?

Mr. BABCOCK. Well, the reviewing body, which would be the chairman of the Conference, assisted by a review commission in one instance, and a three-member body, of which the chairman would be one, under H.R. 6768—that body determines that the judge is not qualified and directs the agency to terminate his appointment.

Under certain circumstances he may have a right to review by the Merit Systems Protection Board.

The Chairman. How did the existing APA provisions and the case law interpreting those provisions deal with the problem of the interruption of a case due to an ALJ's retirement or resignation?

Mr. BABCOCK. Not very well, Senator Cannon.

The APA provides—all it says now is that the decision shall be made—in a case, shall be made by the judge who heard the evidence if that judge is available. But it doesn't say what should happen if he is not available. And this, as we all know, has led to certain problems.

We suggested an amendment to that portion of the Administrative Procedures Act, which I believe is in all of the omnibus regulatory reform bills.

We did so to make it clear under existing law that an agency can assign another judge to such a case and that judge can go on and handle the case, and all he has to rehear are witnesses whose demeanor is significant to the case.

He has to call back people—if it is a case of who's lying in that sort of a situation, then he has to call back those witnesses. Otherwise, he can go ahead and hear the case and render a decision.

And this provision is, I believe, in all of the regulatory reform bills now pending.

Under present law, it is up in the air. And this is what I understand—what caused the FTC to get into the situation with Judge Hinkes, which I understand this hearing will be going into—that you'll be asking a few questions of Chairman Pertschuk and others.

The CHAIRMAN. Yes, we will have questions, obviously, on that particular type of situation.

Do you have any specific recommendations as to how this type of problem can be solved?

Mr. BABCOCK. Well, we would advocate the enactment of the amendment to the Administrative Procedures Act, which we—specifically Dick Berg—suggested to the various committee staff—which provides that the agency can appoint a new judge, and the new judge can just take over where the old judge left off, except when the demeanor of a witness is important. Then he would have to recall that particular witness, but only that witness. That is what we would recommend.

As I understand it, informally, the agencies are under some pressure and the FTC was, in a word, over a barrel in that situation, or felt itself to be over one.

The CHAIRMAN. Isn't that awfully difficult though for a judge to make a determination as to which witnesses that have already testified, whether their demeanor might be important to the case?

Mr. BABCOCK. I think once—I think it would be difficult if he were fresh on the case; but if he goes ahead and hears the rest of the evidence and then sits down and thinks about it, what the key issue is, then he would, we think, know which witnesses to recall.

And bear in mind, Senator Cannon, that in many of these cases you doesn't even get into the question of witness demeanor.

As I said earlier, in answer to one of Senator Heflin's questions, there is no such thing as the demeanor of an airline company or of a truck-line company.

The more complex economic cases, where judge unavailability is more likely to become a problem, are precisely those kinds of cases where demeanor evidence is not so important.

This matter doesn't arise in the Social Security Administration because the case don't take that long. It is only in these very large complex cases that this is an issue.

The CHAIRMAN. Thank you, Mr. Chairman.

Senator HEFLIN. Has any thought been given to the concept that when an administrative law judge, in effect, leaves active duty, he assumes a senior judge status?

Mr. BABCOCK. In a way, that happens at the present time, Senator Heflin.

Senator HEFLIN. Where he could continue, it may well be that he might want to make a choice. He might have a small incentive, based on the way he would continue which would allow for these interruptions and the appointment of a new judge.

I can see that the litigation on your proposal as to whether a witness' demeanor was such that it should require the rehearing could be endless litigation in courts.

I don't have any concrete ideas, about the concept of administrative law judge assuming a senior judge status and continuing to hear cases.

But the Federal Courts have made great use of senior judges in their continued use over the period of time. I wish you would give some thought to that. There may be some questions we would like to submit to you in writing.

Mr. BABCOCK. We would be pleased to answer any such questions, Senator.

Well, let me say that agencies can now rehire retired judges, with the permission of the Office of Personnel Management; but the problem in the *Hinkes* case would not have been solved by that, because, at least as I understand it, the complaint that was made there was that since the judge could leave at any time, once he had agreed to be rehired, he could throw a monkey wrench into the agency's proceeding.

That potential exists in the case of any rehired judge. He could always threaten to quit three-quarters of the way through a long proceeding, and that puts the agency in a bind.

Let me also say that your point is a good one, and I certainly agree that in some cases you could get into a lot of litigation over what kind of demeanor evidence required the recalling of a witness. But we feel that there are some cases where this isn't an issue; and for those cases, the amendment we have suggested would be helpful in permitting the agency to go ahead and get its business done.

Senator HEFLIN. Have you considered the evaluation of agency heads in relationship to the administrative law judges?

Mr. BABCOCK. Under the present system, the nomination of the agency head and the agency members is given to the President, with the advice and consent of the Senate. And I don't think it would be appropriate for the Administrative Conference to attempt to get into that process.

Senator HEFLIN. Well, maybe an agency of the Congress might look into that. Well, I don't know. You know, the law says that ALJ's independent from investigative or prosecutorial personnel, but it doesn't say anything about agency heads.

Mr. BABCOCK. Well, the heads of agencies control the investigative and personnel. They don't need to be independent from them. Those people work for them.

Senator HEFLIN. I'm not sure that that is the concept that is desirable.

Mr. BABCOCK. Well, the National Labor Relations Board is one example that you can look at; there is a different structure there. The prosecuting arm is under the head of an independently appointed general counsel, who is not subject to the control of the members of the Board. And there the analogy is a little closer to the U.S. attorney, who is an independent entity, who has discretion as to how and what kinds of cases he will bring before the courts.

Senator HEFLIN. Well, I'm not sure. These are just ideas we are exploring.

All right. We will submit some further questions to you in writing. And we appreciate your coming.

Mr. BABCOCK. It's been a pleasure being here, and we hope we've been a help to you and the committee.

[The following information was subsequently received for the record:]

QUESTIONS OF THE COMMITTEE AND THE ANSWERS THERETO

Question 1. One of the arguments advanced for limiting the tenure of ALJ's is to deal with the problem of subpar performance. On the other hand, as you note, opponents of limited terms argue that they will infringe upon the independence of ALJ's and that there is a danger that they will "politicize" the ALJ corps. Considering the careful screening of ALJ's during the current selection process, do you believe that the problem of subpar performance is so serious or prevalent as to warrant the limitation of tenure? Would not periodic evaluation serve the same purpose?

Answer. We do not know how serious or prevalent the problem of subpar performance by ALJs is, and this is one reason why we hestitate to endorse the limitation of tenure. But no appointment process, however careful, can entirely eliminate the possibility of a poor choice (or, indeed, of failing capacities in an ALJ who was initially a good choice). For this reason, there is general agreement, we believe, that there ought be some method for evaluating an ALJ's performance and removing or reassigning him if he is not measuring up. The key question is how hard it should be to remove an ALJ. A limited term, with renewal based on a periodic evaluation, might facilitate a winnowing out of subpar performers, since it is likely to be easier, both in terms of procedure and even psychologically, to fail to reappoint than to

institute formal removal proceedings. But there is an inevitable tradeoff here. Any measure which makes it easier to remove ALJs has some potential for hindering recruitment and for appearing to politicize the ALJ corps. At this time, we are inclined to favor periodic evaluation without a limitation of tenure. The experience with a systematic evaluation process will at least tell us more about how serious the problem of subpar performance is, and if periodic evaluation coupled with the prospect of removal proceedings proves an inadequate spur to performance, a more drastic change can then be considered.

Question 2. One of the proposals under consideration provides for 10-year terms for ALJ's. At present, the corps has been successful in recruiting outside attorneys and highly qualified applicants, including a number who are earning more than the present ALJ salary. One consideration certainly is the security involved under the present process. If limited terms should be adopted, what effect do you anticipate this would have upon the caliber of applicants for ALJ positions?

Answer. It is already difficult to attract private attorneys to ALJ positions. Indeed, as of March 1980, of 220 eligibles on the GS–16 register, only 23 were private attorneys. But, in all candor, if the present disparity in compensation between lawyers in government and lawyers in the private sector is permitted to continue or even to increase, the question of the effect on recruitment of limited or unlimited terms is likely to be academic. I wonder whether many lawyers worth their salt would turn down a job they found otherwise attractive because of the possibility that after ten years they might not be reappointed.

Question 3. One of the issues we are looking at is the selective certification method used by some agencies. It has been alleged that existing procedures, particularly veterans preference (which the Administrative Conference would eliminate) have resulted in selection of relatively small percentages of women and minorities. With regard to selective certification, isn't it likely that this may have had the opposite effect—permitted women and minorities to qualify. What is your view of this? Will elimination of selective certification affect the recruitment of women and minorities?

Answer. OPM testified in March 1980 that out of 1127 ALJ's, 43 were women and 54 were "minorities". We have no way of knowing whether the selection of those particular persons was facilitated by agency use of selective certification. Perhaps OPM has that information.

The Administrative Conference has recommended both the elimination of veterans preference as applied to the ALJ selection process and the scaling down of selective certification (see ACUS Recommendation 69–9, 1 C.F.R. 305.68–9). Our feeling is that agencies (more specifically, agencies employing GS–16 ALJs) utilize selective certification to widen their options for selection by avoiding the restrictions of the present process, the Veterans Preference Act and the "rule of three." Thus, selective certification adds flexibility to an unnecessarily rigid system and also indirectly benefits non-veterans applicants, who may include women and minorities. We, therefore, recommend that selective certification be continued in some form, at least until veterans preference is removed. However, in and of itself, selective certification should not be viewed as the solution to the problem of recruitment of women and minorities.

Question 4. A study done for ACUS in 1969 reported that in the preceding 5-year period, 52 of the 66 ALJs appointed by the agencies utilizing selective certification had been previously employed on the staff of those agencies. If selective certification was eliminated, would it result in more of a balance of ALJs from private practice and other areas of Government service?

Would a mix of ALJs from the outside as well as former staff be of positive benefit?

Answer. Certainly, most observers would feel that it is desirable for agency ALJ staffs to have a mix of persons recruited from both within and outside of the employing agency. Selective certification should not, *per se*, be a hindrance to the recruitment of outside attorneys, because outside attorneys can qualify for selective certification as readily as agency staff. (Such qualification normally only requires two years of specialized experience.) Here again, the real problem seems to be the salary compression in the high grades of Government, which puts the Government at a severe disadvantage in attracting well-qualified and established attorneys in private practice to apply.

Question 5. The former ABA President, Bernard Segal, stated that the role of the ALJ was "largely that of a finder of fact, not a special master." Historically, was the ALJ position designed to provide employees with special expertise to decide cases?

Answer. As we indicated in our testimony, prior to the passage of the Administrative Procedure Act (APA) in 1946 agencies often used subordinate employees to hear

cases on an ad hoc basis. The APA was designed to improve the status, competence, impartiality and independence of hearing examiners.

The very establishment of the position of ALJ (originally hearing examiner) indicates an intent to provide for a cadre of persons with special abilities to preside over hearings and make initial decisions in cases.

However, it should also be remembered that the APA (5 U.S.C. §§ 556 and 557) permits an agency to hear a case itself, thereby omitting the ALJ entirely, or to assign the ALJ to hear the case and recommend a decision to the agency. Furthermore, even where the ALJ is authorized to decide the case initially, the agency reviewing the ALJ decision "has all the powers which it would have in making the initial decision" (§ 557(b)). The residuum of power is in the agency, but the use of ALJs is intended to free the agency members from having actually to preside over the cases.

The ALJs role, then, is first and foremost to preside over the assembly of the record, and to find the facts, particularly those facts which must be ascertained from "demeanor evidence." Less significant is his role as an interpreter of law or of agency policy, for here it is his duty to follow the guidance expressed in agency decisions, rules and statements of policy. Where agency law or policy is unclear the ALJ may try to formulate it, and it is frequently of great value to an agency to have the benefit of an initial ALJ decision or recommended decision, even where that decision turns on legal or policy issues. But it must be recalled that the agency is not bound to accord special weight to the ALJ's views on law or policy, and that even on factual issues the ALJ can be reversed by the agency.

Question 6. If agency heads were no longer allowed to choose ALJs, but instead ACUS appointed a panel of ALJs to each agency, would this result in greater independence for ALJs?

Answer. This question assumes that the appointment, administration, and housing of ALJs by the 29 employing agencies lessens the independence of the ALJs. We do not think there has been an adequate showing of this effect, although we do not mean to minimize the possible appearance of a problem.

Certainly, a centrally administered corps of ALJs, whether administered by ACUS or anyone else, might appear more independent—and perhaps even be more independent. However, the administrative problems in administering a corps of 1100-plus judges (most of whom are concentrated in 5 agencies) with such multifarious backgrounds and experiences, require a great deal of study.

Among other questions to be addressed would be the amount of control given to the head of such an organization (whether or not in ACUS) and the degree of political power and independence wielded by such person. The wrong mix could lead to greater politicization of the ALJ program than critics find in the current program.

Senator HEFLIN. We are pleased to have with us a panel of agency heads today, Hon. Charles D. Ferris, Chairman of the Federal Communications Commission; Hon. D. W. Gaskins, Jr., Chairman of the Interstate Commerce Commission; Hon. Michael Pertschuk, Chairman of the Federal Trade Commission; and Hon. Thomas Moakley, Vice Chairman of the Federal Maritime Commission.

On my list, Mr. Ferris, you are the first one. And we would be delighted to hear from you.

STATEMENT OF HON. CHARLES D. FERRIS, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Mr. FERRIS. Thank you, Mr. Chairman.

I have submitted a statement to the committee. I don't know if it is your preference to have me summarize that or reiterate it, or whatever.

Senator HEFLIN. Why don't you summarize it.

Mr. FERRIS. Well, I suppose the best way, Mr. Chairman, to summarize the testimony that I have submitted is that I think the present system of administrative law judges at the Federal Communications Commission is working and is working well.

We, at the Commission, employ 12 administrative law judges who conduct hearings on matters where formal presentation of evidence and compilation of a formal record are required. Such matters include contested license proceedings and ratemaking proceedings in the area of common carriers.

As in other agencies, the Commission's administrative law judges normally prepare initial decisions which may stand as the Commission's opinion, absent any appeal.

Under the Communications Act, the Commission has a permanent Review Board to hear appeals of the initial decisions from the administrative law judges. And then there is a procedure for appeal from that Review Board to the Commission itself.

In certain areas of revocation of licenses, there is the opportunity to go directly—from the administrative law judge directly to the Commission. And in all cases, by petition, an aggrieved party can petition for the Commission to receive the appeal directly and bypass the Review Board.

The Commission retains full authority to review de novo the proceedings before the administrative law judge and to make its own interpretations and inferences and ultimate judgments with respect to the application of the Communications Act and the policies evolved by the Commission to the particular disputes and controversy.

At the Federal Communications Commission, the most time-consuming and difficult adjudicatory decision required by the Commission's mandate is the selection among qualified applicants for the use of a particular radio frequency.

Right now almost 70 percent of the cases pending before the FTC administrative law judges are of this type. The most notable, of course, are applications for a radio or television station.

And when you have multiple applications, making the choice as to which of these applicants would best serve the public and which applicant should be awarded this very precious license, a well-reasoned choice between these mutually exclusive applicants is almost impossible. And the decision may be rendered ultimately on differences which are relatively minor to the applicant's ability to serve the public interest in the field in which this radio frequency is desired to be used.

Given this situation, it is my belief that it is imperative that new methods that we are attempting to evolve at the FCC, methods of lotteries or auctions, be adopted to make these difficult choices rather than attempt to make an adjudicatory case out of something which becomes almost inherently arbitrary to make choices between applicants.

On the issue of selecting the administrative law judges, I would like to restate a proposal I made in testimony before the Senate Committee on Government Affairs last year concerning the selection of administrative law judges.

I think the present selection system severely limits the discretion of any agency to fill an administrative law judge position with a candidate whom it would consider best qualified for its needs.

By restricting the agency's choice to the three candidates who are rated highest by the OPM, the present system both limits the agency's ability to consider women and minority group candidates,

and it pressures agencies to employ the selective certification procedures to assure that a choice of candidates with technical and other background and experience necessary to do the job.

The purpose of limiting agency choice appears to be to assure high quality appointments; but the cost, I think, of this procedure is significant. Candidates who may be nearly as well qualified in the general objective criteria used by OPM, or who may be better qualified for the particular agency position, are not available for the agency's consideration.

And in some cases, then, the best candidates for a particular agency may not be selected.

I think to resolve this problem, at least one alternative would be to expand the pool of candidates that is made available to an agency by OPM.

I think it puts more of the responsibility on the agency for selection of the administrative law judges, and it is the agency that is going to have to work with those judges. And I think putting the responsibility—greater responsibility—on the agency is the type of responsibility that should be imposed upon any administrative agency.

I think I have hit some of the basic factual points in my prepared statement, Mr. Chairman. And I would be delighted to expand upon any of those or any other aspect of my statement in the question and answer period.

Senator HEFLIN. All right, sir.

[The statement follows:]

STATEMENT OF HON. CHARLES D. FERRIS, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Thank you for the opportunity to speak today concerning administrative adjudication and the status of administrative law judges.

Let me begin by discussing the independence of administrative law judges. At the Federal Communications Commission, administrative law judges are an integral part of the agency's overall decisionmaking process. The relationship between the Commission and its administrative judges may be usefully viewed as analagous to the relationship between Congress and the independent regulatory agencies. The agencies perform tasks which are essential to implementing congressional goals, and they enjoy a level of autonomy which assures an independent and expert perspective in their decisions. Nevertheless, ultimate control over the agency's policy rests largely with the Congress, and the agency's responsibility is to implement the will of Congress as it has been expressed through statute. Similarly, while administrative law judges have total independence from agency intrusion as they perform their adjudictory duties, their responsibility is to implement the will and legal mandate of the commission as it has been formally expressed through the Communications Act and rules, policy statements, and precedent.

The role and effectiveness of administrative law judges thus cannot, I believe, be considered in the abstract, outside the context of each independent regulatory agency's enabling statute. For, if an administrative law judge at the FCC makes an initial decision in a license renewal or comparative licensing case, it is ultimately the seven FCC commissioners's statutory responsibility to make the final decision. To increase the independence of administrative law judges by changing the standard or scope of review by the seven commissioners would fundamentally revise the FCC's substantive responsibilities in overseeing radio licensing. Our statutory licensing scheme is based on the fundamental premise that the independence and autonomy of licensees is more effectively guaranteed through a scheme which mandates collegial decisionmaking by seven politically diverse and independent commissioners—not decisionmaking by a single, albeit independent, individual.

Likewise, in the area of common carrier ratemaking, increasing the role and independence of administrative law judges would hinder the ability of the FCC to impose common criteria, standards, and methodologies. the ultimate result would be

to imperil the ability of the FCC to develop integrated national telecommunications policies.

In a nutshell, the Subcommittee should carefully bear in mind the old truism that procedural and substantive issues cannot be divorced and that procedural regulatory reform and substantive regulatory reform are closely intertwined. This is indeed the main point I would like to stress this morning. Not only do procedural changes in the role and responsibilities of administrative law judges have a significant substantive impact on the ability of an agency to carry out its specific statutory responsibilities. The reverse is also true. Outdated substantive policies can impose needless and intolerable burdens on the entire adjudicatory process, draining away scarce resources and creating delays for all parties.

I intend to discuss in further detail how, for example, the initial licensing process of the Commission imposes such overall delays and is in need of specific reform. But I want to stress here that part of the real remedy for perceived problems in the adjudicatory process is not procedural but substantive reform. With these general observations let me amplify these points with further background and examples concerning the FCC's adjudicatory process.

The Commission now employs twelve administrative law judges who conduct hearings on those matters where formal presentation of evidence and the compilation of a formal record are required. Such matters include contested licensing proceedings and contested common carrier ratemaking proceedings.

As in other agencies, the Commission's administrative law judges normally prepare initial decisions which may stand as the Commission's opinion absent appeal. However, as authorized by the Communicatins Act of 1934, as amended, [47 U.S.C. § 5(d)] the Commission has a permanent Review Board to hear appeals from initial decisions. The Commission's rules do provide that appeals from initial decisions involving renewal or revocation of a broadcast or common carrier license will be heard directly by the Commission. Also, the Commission retains full authority to direct that any other initial decision be brought directly to it for review. Under the Act, the process for review also allows the Commission to decline a petition for review of a Review Board decision without specifying a reason therefor.

Another body that aids the Commission in adjudicatory matters is its Office of Opinions and Review. This Office contains legal, engineering, and accounting personnel who aid the Commission in writing opinions. This Office also performs other tasks related to adjudication, such as drafting decisions pursuant to Commission instructions and disposing of motions pursuant to delegated authority.

While the Commission's adjudicatory process has worked well as a whole, it has often suffered from regulatory delay. Reducing this delay has been a principal concern of the Commission during my tenure as Chairman, and the agency has taken some major steps to improve its ability to resolve contested matters promptly.

As stated at the outset of my testimony, problems such as regulatory delay are more related to the specific responsibilities of this agency, rather than difficulties that could be resolved by any major restructuring of the overall system. Further, the Commission's experience has demonstrated that solutions that promise theoretical improvement may have adverse practical consequences.

The most time consuming and difficult adjudicatory decision required by the Commission's mandate is the selection among qualified applicants for use of a particular radio frequency. Right now almost 70 percent of the cases pending before FCC administrative law judges are of this type. A well reasoned choice between these mutually exclusive applicants is almost impossible, and the decision may be rendered ultimately on differences which are relatively minor to the applicant's ability to serve the public interest. Given this situation, it is imperative that new methods—such as lotteries or auctions—be adopted. The effect would be a dramatic reduction in the Commission's adjudicatory caseload.

While I consider substantive changes to be essential, changes in the Commission's adjudicatory procedures are also important. Last year, the Commission adopted revisions in its adjudicatory procedures. In part, these new procedures set limits on the time allowed for applicants to amend their applications, ended the practice—in contested cases—of advising applicants of deficiencies in their proposals prior to designation for hearing, and streamlined and simplified the procedures for establishing filing deadlines. Also, the new procedures terminated a three-year old policy whereby the specific issues to be litigated were to be resolved prior to designation of the contested applications for hearing. Responsibility for resolving motions to enlarge, modify, or delete issues is now assigned to the presiding administrative law judge.

While these procedural changes might somewhat reduce the panoply of protections afforded litigants against possible agency mistreatment, the Commission's experience has been that the cost of implementing these protections was the denial

of a much more important right—to a prompt, as well as fair, resolution of the dispute. Under the old procedures, the resources of small applicants for radio frequencies were often exhausted merely by the lengthy delays, and such applicants either were forced to drop out entirely or were absorbed by better financed entities. The evidence now indicates that such "resolution by attrition" will be significantly reduced as a result of the Commission's action.

The new procedures address a major cause of administrative delay at the Commission. Further, they illustrate the broader problem that excessive costs may attach to efforts to perfect due process protection. With this background in mind, let me address the issue of selecting administrative law judges. I would like to restate a proposal I made in testimony before the Senate Committee on Governmental Affairs last year concerning selection of administrative law judges.

The present selection system severly limits the discretion of an agency to fill an administrative law judge position with the candidate whom it would consider best qualified for its needs. By restricting the agency's choice to the three candidates who were rated highest by OPM, the present system both limits the agency's ability to consider women and minority group candiates, and it pressures agencies to employ "selective certification" procedures to assure a choice of candidates with technical or other background experience necessary to the particular job.

The purpose of limiting agency choice appears to be to assure high quality appointments, but the cost of this procedure is significant. Candidates who may be nearly as well qualified in the general objective criteria used by OPM, and who may be better qualified for the particular agency position, are not available for the agency's considertion. Thus, the best candidates may not be selected.

To resolve this problem, the pool of candidates made available to the agencies by OPM should be greatly expanded. It is the agency that is responsible for the work of its administrative law judges despite their independence from agency control. Accordingly, the agency has strong incentive to select the most highly qualified individuals for such positions. So long as essential protection from agency bias to individual litigants is maintained (as it would be under this revised selection process) the system would be improved by an increase in the agency's responsibility. Such increased responsibility would both aid the agency in performing its duties, and it would ease the role of Congress to oversee and correct the system through its oversight of the particular agency.

Thank you again for this opportunity to state my views. I would be pleased to answer any questions you or any members of the Committee may have.

Senator HEFLIN. I think we will just go through the opening statements by all of the agency heads first.

Mr. Gaskins.

STATEMENT OF HON. DARIUS W. GASKINS, JR., CHAIRMAN, INTERSTATE COMMERCE COMMISSION

Mr. GASKINS. Mr. Chairman, I appreciate the opportunity to be here to discuss the administrative law judge system as it works at the Interstate Commerce Commission.

I will describe how the administrative law judges function within the ICC and the relationship between the ALJ's and the Commission.

Forty ALJ's work at the ICC. For the most part, they act as presiding judges in conducting the formal Commission hearings under the provisions of the Interstate Commerce Act and related acts administered by the Commission.

They independently develop the record in these proceedings and generally issue initial decisions containing findings of fact, discussions of law, and recommendations for action.

Absent the filing of appeals by the parties or a stay by the Commission, the initial decisions become the final decisions of the Commission.

The ALJ's are part of the Commission's Office of Hearings. The Office is headed by a chief administrative law judge. The ALJ's are provided support services by the Commission including office space,

secretarial personnel and law clerks, travel allotments and funds for stenographic services.

The chief ALJ submits his annual budget request, including salaries of the ALJ's and support staff, to the Commission and this becomes part of the "Salaries and Expenses" budget for the Commission as a whole.

ALJ positions at the Commission are filled by the chief ALJ in coordination with the ICC Personnel Office and the Office of Personnel Management.

When a vacancy occurs, the Office of Administrative Law Judges of OPM submits a list of candidates, in numerical grade order, on the selective transportation register and the general register.

The chief ALJ interviews the eligible candidates and selects one name from the top three names on the selective register. He then submits his choice to the Chairman of the Commission for approval.

I might add at this point that the question of fairness to all applicants or whether we get the best applicant is largely irrelevant at the Commission now. For the last several years, we have been decreasing the number of administrative law judges and so we have not had to make any appointments, I have no direct information as to whether or not the system for selecting the ALJ's works fairly or not because we haven't been in the process of selecting any.

The compensation, promotion, demotion, suspension and removal of ALJ's are governed by OPM regulations. An ALJ may be removed only for good cause as determined by OPM. In the last 10 years, the Commission has removed one ALJ.

At the Commission, ALJ's hear a variety of types of cases in the areas of finance, rates, and operating rights. However, the overwhelming majority of cases at the Commission are handled by the legal staff of the Office of Proceedings without an oral hearing under "modified procedure."

Pursuant to special statutory authority, employee boards are empowered to render decisions based on an evaluation of written evidence. Only the most difficult and complex cases and those requiring cross-examination are set for oral hearing before ALJ's.

Recently, the focus of the cases requiring oral hearing has changed dramatically. Whereas in fiscal year 1979 over 80 percent of the cases handled by ALJ's were motor carrier licensing applications, very few of such cases are now assigned for oral hearing.

This change has been brought about by recent changes in Commission policy and by enactment of the Motor Carrier Act of 1980.

The relaxation of entry standards, strict time deadlines for decisions, and the increase in the volume of applications have made hearings increasingly impractical.

As a result, the Commission plans to reduce its ALJ staffing. By the end of fiscal year 1982, the Commission estimates that it will employ 22 ALJ's, down from the current level of 40.

The normal process of attrition will account for part of the reduction in ALJ staff, but the Commission still faces a problem in adjusting ALJ staff levels to match the decline in workload. Since ALJ's at the Commission deal in a variety of regulatory matters, ALJ's have transferred and probably will continue to transfer to

other agencies without any great difficulty, with OPM supervising the transfer process.

Sending ALJ's on detail to other agencies remains another possibility.

The Chief ALJ supervises the assignment of all the Commission's cases designated for oral hearing. They are assigned by the Chief ALJ to individual ALJ's on a rotation basis to the degree practicable.

The Chief ALJ has the responsibility for monitoring the performance of the Commission's ALJ's, and they must submit various reports of their activities to him.

He reviews those reports and discusses with individual judges any production or performance problems. If an ALJ retires or is otherwise unable to complete pending cases, the Chief ALJ will assign such cases to other ALJ's.

The Office also keeps ALJ's informed of relevant legislation, court cases, Commission policy decisions, and other matter affecting their work through regular meetings and continuing legal education programs.

ALJ initial decisions are appealable, as a matter of right, through the administrative process. Ordinarily after the issuance of an initial decision, ALJ's have no further role in the decisionmaking process.

The appropriate appellate body of the Commission decides whether to affirm, modify or reverse the initial decision based on the recommendation of the Commission's Office of Proceedings, an office independent from the Office of Hearings.

The Commission may also stay the effect of an initial decision on its own motion. In this manner, the Commission is afforded an opportunity to assure that the independent decisions of ALJ's, which represent decisions of the Commission when not appealed, are consistent with Commission policy for which the Commission is held accountable by Congress and the courts.

In summary, we believe that the administrative law judge system at the ICC works effectively. The Commission's only concern is in dealing fairly and effectively with the necessary decrease in the number of ALJ's needed to carry out the congressional mandate to the Commission.

While we are aware that different systems are in place at other agencies having different missions and needs, we believe that our own system works well at the Commission while at the same time preserving the essential integrity and independence of the ALJ decisionmaking process.

This concludes my prepared statement. I will be glad to try to answer your questions at this time.

Senator HEFLIN. Thank you.

Mr. Pertschuk.

STATEMENT OF HON. MICHAEL PERTSCHUK, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. PERTSCHUK. Thank you, Mr. Chairman.

I have a brief statement that I will read. Mr. Chairman and members of the subcommittee, I am pleased to participate to dis-

cuss the corps of administrative law judges and its relationship to the administrative agencies.

Because law judges play so central a role in effective agency decisionmaking, I think that the subcommittee's initiative in taking a hard look at their relationship to their parent agencies is commendable.

I want to say at the outset that, in my view, the current system not only works, but works well. At the FTC today, we have a corps of administrative law judges who are competent, impartial, and independent.

They perform their responsibilities wholly without agency interference. That is my experience, and I am certain that my predecessors at the FTC will confirm that conclusion. So, too, will my colleagues here today, with respect to their agencies.

The success of the present administrative law judge system is, of course, no accident. When Congress enacted the Administrative Procedure Act in 1946, it carefully designed an adjudicatory process that has, as integral components, ALJ independence and impartiality. This is so from the very outset, the method of ALJ selection.

The Office of Personnel Management, not the individual agencies, undertakes ALJ recruitment and examination. OPM sets the standards, OPM does the screening, and OPM prepares the list of qualified applicants from which an agency seeking to hire an ALJ must choose.

Once hired, a law judge does not answer to the agency for his performance, as other employees do. While the chief administrative law judge monitors workload to assure acceptable productivity, no effort is ever made to direct one or another outcome to an ALJ's decision.

During the course of an adjudication, a law judge is insulated from any ex parte communication on the merits. He compiles the record at trial and makes rulings as he sees fit.

At the FTC, the Commission does not involve itself at all in ALJ decisionmaking, except in the rare event when it grants interlocutory review of an ALJ order.

The law judge's initial decision is likewise free of any interference from anyone. He calls the facts and the law exactly as he sees them.

At that point, if his decision is appealed, the Commission quite properly applies its own perspective to the evidence.

That, after all, is a principal purpose for which a bipartisan body of experts was created by Congress. But though the Commission sometimes disagrees with the legal conclusions of a law judge, an analysis of Commission decisions will demonstrate the Commission's confidence in, and reliance upon, the evidence adduced under the ALJ's supervision.

There is, in short, exactly the synergy of independent decisionmakers—the law judge who compiles the record and draws his conclusions from it, and the Commission that draws from its experience and collegiality its final view of the statutory enforcement entrusted to it—that Congress envisioned when it created the regultory agencies.

In my view, this process produces far more effective decisionmaking than either an ALJ acting alone, or an ALJ acting in conjunction with some external body devoid of experience with the complexities of FTC law enforcement.

Yet I recognize that some observers are troubled about the current structure and procedures. They perceive that law judges are dependent upon their parent agencies and appear to be biased in favor of agency prosecutions.

That view is not borne out by experience, but as is often the case, appearances must be dealt with, for they create a sort of reality all their own.

I therefore would like to raise a couple of ideas that may merit further consideration.

First, on ALJ recruitment, I think it might be valuable if OPM were given the resources to widen its recruitment effort. Our concern at the FTC, as I'm sure is true at the other agencies, is to enjoy the services of well-qualified law judges, able to handle the often complex cases that arise under our statutes.

So long as that criterion is satisfied, we have no particular preference as to the background of law judges.

If a greater proportion of our ALJ's were recruited from private law practice, rather than from the agency itself, that would be entirely acceptable, assuming that proficiency standards were maintained.

The major difficulty, I believe, is the substantial gap in salary between private practitioners of the requisite experience and skill and ALJ's.

Nevertheless, OPM can perhaps seek ways to broaden its recruitment efforts.

Second, the idea of assigning administrative responsibility for ALJ's to a single entity, such as OPM or the Administrative Conference, instead of to the individual agencies as is now the case, merits further consideration.

It may be that even the minimal agency involvement in approving ALJ budget requests and the like contributes needlessly to the appearance of ALJ dependency.

While I understand that this concept of centralization has been proposed in the past, and was subjected to intense criticism from some agencies, I think it would be fruitful if a fresh look were given to its pros and cons.

Finally, efforts at increasing ALJ independence ought to be accompanied by correlative efforts to assure high levels of ALJ performance.

The Commission has in the past supported the concept of periodic evaluations of ALJ's, as contained in regulatory reform legislation proposed by the Carter administration and by Senator Ribicoff and others.

So long as the agency itself is divorced from the evaluation process, I believe that periodic certification of high performance by the vast majority of law judges, together with a weeding out of the few who do not perform satisfactorily, can only enhance the respect for an independent corps of administrative law judges.

That concludes my prepared remarks, Mr. Chairman.

I will be glad to respond to questions.

Senator HEFLIN. Mr. Moakley.

STATEMENT OF HON. THOMAS MOAKLEY, VICE CHAIRMAN, FEDERAL MARITIME COMMISSION

Mr. MOAKLEY. Good morning, Mr. Chairman.

I appear on behalf of the Federal Maritime Commission today to offer the subcommittee whatever assistance or information you may desire on the subject of administrative law judges at the FMC.

Being the last man to appear before you, there is very little I can say that won't sound redundant; therefore, I would like to enter my statement into the record and just briefly summarize for you, if I may.

I can find no particular instances in the Federal Maritime Commission where we have interfered with the independence of the administrative law judges.

This has been borne out by the chief administrative law judge, Mr. Cograve, who is accompanying me here today.

I might say, however, that we do feel at the Federal Maritime Commission that prior Commission decisions weigh heavily upon what the administrative law judge may do, just as U.S. district court judges are governed by the decisions of their respect appellate courts.

The hiring process within the Federal Maritime Commission is limited to the administrative law judges from other agencies and the register of the OPM. With respect to the selective certification process, we did away with it about a year ago at the Federal Maritime Commission so that there could be no claim of bias in favor of the agency.

With those brief remarks, much of what remains in my testimony has already been said, so I would thank you very much for your time.

[The statement follows:]

STATEMENT OF HON. THOMAS F. MOAKLEY, VICE CHAIRMAN, FEDERAL MARITIME COMMISSION

Good morning, Mr. Chairman. I appear on behalf of the Federal Maritime Commission today to offer the Subcommittee whatever assitance or information you may desire on the subject of Administrative Law Judges at the FMC.

Much of the information pertinent to your hearings would seem to be contained in our August 21, 1980, response to Chairman Cannon's questionnaire on ALJ's and I will not repeat that material here. However, I would like to expand on several subjects touched upon in that response which I believe are central to your inquiry.

First, ALJ's are employed by agencies such as the FMC in order to assist the agency in reaching decisions, primarily in cases involving disputed factual questions. Their expertise is in the area of administrative procedure and their input to the Commission is in the form of recommended or initial decisions. The Commission must then decide whether to adopt these decisions as its own and, in so doing, determine whether such decisions are consistent with Commission policy.

Second, and related to the first subject, is the fact that ALJ's are bound by prior Commission decisions in the same manner that United States District Court judges are bound by the decisions of their respective appellate courts. They do not have the authority to decide that a particular Commission interpretation of the law is erroneous or that a Commission-announced policy is unwise.

This limitation is fundamental to the administrative process and recognizes the essential fact that the agency has the inescapable responsibility for its decisions. Changes in policy or in interpretations of governing statutes can only be made by the Commission or by reviewing courts and not by ALJ's. Otherwise, the FMC, with its seven ALJ's, may have seven different policies on the same question.

This is not to say, however, that an ALJ may not suggest to the Commission that a particular policy may have outserved its usefulness. An ALJ may, while recogniz-

ing that he is bound by Commission precedent, suggest in his decision that the record in the particular case may warrant a modification of the precedent or even its repudiation. The decision on the merits would be made in accordance with precedent but at the same time the Commission would receive the benefit of the ALJ's views on the continuing validity of the principles embodied in that precedent.

Thus, the primary reason for the independence of ALJ's from direct agency control is not to ensure that their decisions are completely free of agency influence. The influence is properly there through prior Commission decisions and other forms of policy pronouncements, such as regulations. The independence of ALJ's from agency control is intended rather to insulate ALJ's from improper agency influence and to ensure that their factual determinations and conclusions are based solely upon the record in a particular case and not upon ex parte contacts, including supervisory direction from the agency. It is this same rationale which dictates that individual ALJ's be free of substantive control over their decisions by the chief ALJ. Each case must be decided upon the record in that case.

The agency has two sources from which it may recruit ALJ's: other agencies employing ALJ's, and the register of eligibles maintained by the Office of Personnel Management. The register includes all those applicants who have scored 80 or more points in the evaluation process of OPM and ranks them in the order of their scores, with the highest at the top. If the agency has a vacancy it must fill it from the top three available eligibles on the register.

One of the most frequent criticisms made of the selection process is the use of the so-called "selective certification." Selective certification allows an agency to require that an eligible have experience in a particular area of the law before he can be certified to the agency for appointment. It is said that this allows agencies to select ALJ's from within the agency and this practice is believed by some to create a bias in favor of the agency. This potential problem can no longer arise in the Federal Maritime Commission since we no longer use selective certification. We did away with it about a year ago.

While I cannot speak for other agenices, supervision of ALJ's at the Federal Maritime Commission appears to be strictly within legitimate managerial limits and neither the chief ALJ nor I am aware of a single instance where, under the guise of supervision, an attempt was made to influence the substantive performance of an ALJ.

That completes my prepared remarks, Mr. Chairman. I would be happy to address any questions you may have or to elaborate on any of the matters that I have mentioned above. In addition, our Chief Administrative Law Judge, Mr. John Cograve, has accompanied me here today and is ready to come to the table if there are questions in his area of expertise.

Senator HEFLIN. Mr. Moakley, how many administrative law judges do you have in the Federal Maritime Commission?

Mr. MOAKLEY. We have seven administrative law judges.

Senator HEFLIN. What basically do they do? I'm not familiar with their work.

Mr. MOAKLEY. They're basically involved with rate cases, the discovery process, boats, and so forth. They are factfinders.

Senator HEFLIN. Mr. Ferris, you raise an interesting concept that needs to be explored.

In effect, I believe maybe you're saying that your licensing cases should be handled by a hearing examiner under the old concept of a hearing examiner, rather than an administrative law judge, you believe the decisions that are made are so very refined. There may not be a need for an administrative law judge to make the finding of facts as well as policy decisions.

Do I interpret you correctly?

Mr. FERRIS. Well, I think in part, Mr. Chairman, but I go beyond that. I think it's really not necessasry to have anyone making that type of determination in many of these cases.

When two applicants are competing for a valuable resource, a radio frequency, and any of its resources, the law requires that there be a hearing and that has been interpreted as a full hearing rather than a paper hearing in the past, which requires a judge or

a hearing examiner or someone to make facts and determine recommendations as to what the recommended decision is.

I think in many of these cases, for example, if there are two taxicab companies and only one frequency, I don't know why you have to have an administrative law judge or hearing examiner make that particular judgment.

I don't know what factors they would consider. Who would best use this frequency in public interest? It would be much better to determine who needs it most, by having some sort of auction whereby, at least, the system of bidding would determine the intensity of their desire to have this particular frequency.

In other cases such as the multipoint distribution service—which is a system whereby you can transmit video information, video pictures, entertainment which is being used, I think, in the Washington, D.C. area, to bring certain types of paid programing into homes—once basic qualifications are determined that applicants have the engineering characteristics to provide this service and they meet the basic legal qualifications to be a licensee before the Commission, I think it becomes somewhat arbitrary for anyone, any person, to make a determination that party A will get that frequency over party B, if there is only one available.

I think in that case, the Commission can make a basic judgment through a paper process and say both meet the minimal qualifications and what we will do is either have a lottery where we will flip a coin, or we will have some form of system whereby if there are factors with respect to minority ownership and encouraging minority ownership or any other factors that should be considered and weighted, you could have a weighted lottery.

I think that that is a much better system than the type of system that has evolved where the criteria get smaller and smaller and the capacity to be arbitrary gets larger and larger. Some system, other than a person making a judgment, should be adopted.

We are attempting to evolve that type of a system at the Federal Communications Commission and hopefully we will have a test case in this particular area in the near future to see what the court's reaction might be to this type of system, in lieu of the present system which I think slows down the process because judges can't make a reasoned decision in choosing between two competing applicants.

What I meant, Mr. Chairman, was beyond declassifying administrative law judges to something with a different title but performing a similar function to something whereby you could avoid completely the open testimony, the oral testimony and the full-blown hearing to get a system that makes much more sense and would provide more efficient use of the radio spectrum, and certainly more expeditious handling of competing applicants' desire to use that particular radio frequency.

Senator HEFLIN. I understand what you are saying. Are there functions now being conducted by administrative law judges that really don't fall under the classification of quasi judicial?

Mr. FERRIS. I think in these cases where the administrative law judges are seized with this burden of choosing between competing applicants, it, to a degree, is judicial when the law does require

that a reasoned judgment be made to determine one applicant over another.

The law needs some changing, rather than the procedure by which we implement the law. If we can be creative in applying a new procedure to what I think is an outmoded law, and the final arbiters of the law, the courts, determine that this is a valid interpretation of a stale law, well, we will avoid it. And I think we'll update the process.

It would be very, very desirable if the basic charter of the FCC were changed to permit this explicitly, but I think, to some degree, the proposals that are before this committee address these questions and we are moving, hopefully, to find those issues on our own while we await that ultimate judgment.

Mr. MOAKLEY. If I might respond to that also, at the Federal Maritime Commission, we have a series of small and minor cases that do not go before the administrative law judges.

We have settlement offices and we handle them as binding arbitration. Both parties to the dispute agree when they go before the settlement officer that whatever decision is reached, it is not appealed to the Commission or to anyone else and it is really binding arbitration, and it does take a heavier workload off the administrative law judges.

Senator HEFLIN. That is a matter done by consent?

Mr. MOAKLEY. That is correct.

Senator HEFLIN. Are the other agencies that do have, in effect, in the opinion of the agency heads, functions being carried out by administrative law judges that, in effect, are not really quasi judicial?

And that could be just as well carried out by a hearing officer, different from an administrative law judge.

Mr. PERTSCHUK. Mr. Chairman, with respect to the FTC, we do no licensing or ratemaking type cases, and so I think that the matters before our ALJ's are appropriately adjudicatory.

Mr. GASKINS. In terms of the Interstate Commerce Commission, I guess that a hearing examiner could handle some of the cases which involve the resolution of fact, but I think, for the most part, judges are used in the appropriate kinds of cases.

I don't think we have a serious problem of their being used in cases where the judicial aspect of their role is not used.

Senator HEFLIN. Mr. Ferris, excuse me, Mr. Gaskins, I understand you are disposing of at least 90 percent of your cases by using modified procedures.

Have you had any problems with this?

Mr. GASKINS. Well, we have been moving in that general direction for several years now. And we have some problems associated with just handling the paperwork and trying to speedily resolve some of the issues, but that is not really a problem with the modified procedures themselves. That is a problem more associated with the overwhelming caseload that we've been faced with in recent years.

So our experience with modified procedures for the kinds of cases that we've moved to modified procedures has been quite satisfactory.

Senator HEFLIN. We have asked the question pertaining to whether administrative law judges aren't doing tasks that really don't require, in effect, a judicial officer or the reverse.

Are there cases and determinations and decisions, in your agency that are not being conducted by ALJ's that should be, in your opinion?

I would ask that of all you.

Mr. GASKINS. In our case, we have obviously moved away from extensive use of the administrative law judges in operating rights cases as a conscious policy and we are pleased to note that the Senate seemed to basically approve of that thrust in the Motor Carrier Act of 1980.

We are happy with the basic movement that we have made, and we think those individuals that make the decisions in lieu of the administrative law judges are doing an adequate job.

Mr. PERTSCHUK. The one area in which there have been suggestions by members of the bar that the independent ALJ adjudicatory process should be the model, was in the question of rulemaking.

Congress specifically addressed rulemaking in the recent legislation, making the presiding officers in the rulemaking proceedings independent of the Commission but not adjudicators. The legislation draws specifically the line between the rulemaking function and the adjudicative function and spells out, really, a midway ground between a hearing examiner and the ALJ.

That is the only area that I can think of. I think that was appropriate. We supported that delineation of independence, but opposed overjudicialization of the rulemaking process.

Senator HEFLIN. I understand you have been using some ALJ's in the Magnuson-Moss rulemaking, in one proceeding.

Mr. PERTSCHUK. In one proceeding, yes, sir.

Senator HEFLIN. Do you feel that this practice ought to be expanded? What is your feeling?

Mr. PERTSCHUK. I think that the skills in rulemaking are separate and particular skills, and my hope is that the agency, which does relatively little rulemaking, really—we are now at the rate of initiating no more than two or three rulemakings a year—that the corps of hearing officers, specifically set up independently to conduct rulemakings, will be capable of handling it. In the case of the particular assignment you mention, there was a question of the availability of the ALJ, because the Commission adjudicative workload was down, and also an individual available who had very high skills in an area of great complexity and technical difficulty.

I have—I see no objection to the assignment of an ALJ to that process. We did clear that with the Office of Personnel Management. But I think that the roles, while they obviously overlap, are separable, and the expertise, hopefully, can be developed to do the rulemaking separately.

Senator HEFLIN. Do you have anything, Mr. Ferris?

Mr. FERRIS. On the basic question, Mr. Chairman, no, I can think of no areas that should be assigned to administrative law judges that are not being assigned.

Senator HEFLIN. Mr. Moakley?

Mr. MOAKLEY. No, I can't think of any, either, because most of the cases that go before our administrative law judges, the statute requires that we give notice and a hearing, under the Shipping Act of 1916 and the Intercoastal Act of 1933.

Senator HEFLIN. Let me ask you this: How many administrative law judges that you have now employed are former employees of your agency?

Mr. MOAKLEY. I can handle that very briefly. When you say former employees, there is only one of our administrative law judges that stayed within the agency, that came totally from within the agency. I think all of the remaining administrative law judges had acted as an administrative law judge or a hearing officer or attorney in another regulatory agency.

We find that, quite frankly, beneficial, because they bring a mix of talent with them.

Mr. GASKINS. Of the 40 administrative law judges currently employed at the ICC, 29 had experience at the Interstate Commerce Commission before they became administrative law judges.

Mr. PERTSCHUK. We have 10 administrative law judges, although several of them had taken other assignments, including private industry, and in two cases, or three, ALJ assignments with other agencies. All of them have had experience with the Commission at one time or another during their careers.

Mr. FERRIS. I am counting through the résumés here, Mr. Chairman, of the 12 at the Commission presently. Three of the twelve did not have prior experience at the FCC.

Senator HEFLIN. According to your statement, Mr. Pertschuk, in response to the committee questionnaire, the FTC is the only agency that we're dealing with here in which all of the ALJ's are former agency employees.

Would a better balance of ALJ's create a better atmosphere?

Mr. PERTSCHUK. I don't know about atmosphere, Mr. Chairman, but I do think that it would be desirable, as I indicated in my statement; we would hope to be able to attract especially attorneys who have had experience in the private practice of antitrust law. The Commission has been a training ground of ALJ's for other agencies. It is peculiarly an agency of lawyers—for better or worse—and so that it is natural that the trial attorneys, those who have been with the Office of General Counsel and others, would, in their senior career patterns, seek ALJ positions. I don't know how many of the Commission staff have gone on to other agencies as ALJ's, but I know of perhaps 15 or 20 lawyers who left the Commission who have gone on to be ALJ's with other agencies, since I have gotten there, and only one who has come to the Commission.

Senator HEFLIN. Is it reasonable for a finder of fact to say that there is a design to obtain all administrative law judges, from former Commission employees?

Mr. PERTSCHUK. I don't know about a finder of fact. It is a situation that could evoke comment. As you know, Mr. Chairman—the selection of ALJ's, is not controlled by the Commission. The only selection for administrative law judge positions which I made as chairman came in a transfer of a sitting administrative law judge from the CAB, and that, of course, was subject to prior approval by OPM.

Senator HEFLIN. Do you have any problems with delay in the administrative process? Some agencies, I understand, have long delays. There are very complicated cases, no question, that justify long periods but there are institutional problems of the administrative law judge system that is causing delays in determinations and decisionmaking?

Mr. MOAKLEY. I can think of none at the Federal Maritime Commission. The delays in the Federal Maritime Commission are more involved with the fact that we're dealing with international commerce, and the time involved with getting the parties together. But the institutional procedures do not seem to be causing delays.

Mr. PERTSCHUK. Mr. Chairman, we've gone through a fairly elaborate review, over the last 2 or 3 years, of the powers and procedures of the ALJ's, seeking to give the ALJ's more control over the trials of the cases before them, as judges have, because of concern that the abuse by parties, both on the Government side and on the respondent side, for example, of discovery procedures, without control by the administrative law judge can lead to extensive and unjustified delays.

So we have made some changes in the procedures—and are going through the process of seeking comment and revisions—designed to give the ALJ's more control and ability to shape and discipline the trial of the cases. It is a little early to tell whether that is working. But is it our expectation that it will help.

Senator HEFLIN. Does anyone else care to comment?

Mr. GASKINS. Mr. Chairman, in the past 4 years, the ICC has been instructed by Congress, through various pieces of legislation, to speed up our decisionmaking process, and an important area of the 4R Act required us to make decisions with respect to rail mergers in 31 months. We were quite proud of the fact that we have been able to do that.

But in order to meet that deadline, we have had to make some changes in the way we make decisions. It was not clear that long delays were necessarily the fault of ALJ's, but more of the overall process we used in the past. To meet that deadline, we have attempted to scope the case, so that it can be handled more expeditiously. We have, in fact, eliminated initial decisions from administrative law judges in those cases, so that we can meet the 31-month deadline.

The second piece of legislation that spoke to this point was the 1980 Motor Carrier Act, which told us that we have to render decisions in 270 days in the case of an oral hearing and in 180 days in other cases. It also put a limit on the time that we could take for appeals. Based on that legislation that we are turning even more to modified procedures, because we don't feel that we can meet the statutory deadlines and stick to continued reliance on oral hearings.

I do not attribute this to the administrative law judges. It is just that that process, the oral hearing process, is lengthy, and we could not meet the statutory deadline by using that process.

Mr. FERRIS. I think I mentioned probably the most significant problem in the process of getting swift action at the FCC is, Mr. Chairman, the difficulty of making a rational choice between competing applicants, and that has a significant delaying effect.

But in addition to that, I think, to some degree, you have, in any form of competition for licenses at the FCC, certainly in the broadcast area—a war of attrition: If you can last long enough, you'll beat the other fellow down, because he doesn't have the resources to continue to pay his lawyers.

And as a result, the process has a tendency to draw out. We amended some of our procedures to more clearly define issues before the hearing, and to allow the opportunity to amend applications and to improve applications. This was a process initially put in 4 years ago to expedite the procedures, but it turned out to be a process to slow it down completely, because it was an amending process that went on ad infinitum.

But the main thrust of what I would like to emphasize is that those 70 percent of the cases which are presently assigned to administrative law judges which are competing applications, where the criteria for examination was so difficult, and concerned, truly, a winner and a loser, that the judge is sitting there counting angels on the heads of pins, attempting to make a rational decision; that relief from that process, the great inefficiency of the use of resources at our agency.

Senator HEFLIN. I would like for each of you to comment on the need for administrative law judges to have specialized knowledge in your particular agency, concerning the concepts of selection as a requirement and a possible independent corps of administrative law judges, with divisions of specialized expertise. For example, the Federal Trade Commission, and possibly security-type cases would have judges in one division—and another division would include licensing.

Basically, we hear a lot of arguments that there is a need for expertise and experience What would be the effects on your agencies of an independent corps?

Mr. FERRIS. Well, Mr. Chairman, I think the question of whether they have to be expert from within—I went through the statistics here, and of the 12 administrative law judges at the FCC, five have been appointed during my tenure, and of those five, three did not have prior FCC experience.

So I don't think the idea that one must be totally familiar with all of the nuances of communication law to be a good administrative law judge at the agency is at all emphasized, or would be emphasized by me. I think to some degree it's the notion of reinventing the wheel. If you do have someone who has practice within, and people know the track record, and know the swiftness of the person, and the adaptability of the person, the lack of prejudgment of the person, I think that is why one always chooses someone that you're familiar with, and I think that that is always a difficulty when you are picking anyone or recommending anyone for a job.

Résumés, I find, are very stale things to choose people from, or performance from, and I think it is reliance upon track record and personal observation that is best.

But I think that in the areas that I've described, with the difficulty of making judgments in those areas, it is probably much better to get someone with no familiarity to try one of those, because he might come up, or she might come up, with something

more original than those that have gone stale, attempting to make judgments in those very arbitrary areas.

Mr. MOAKLEY. I would say briefly that, as I have said before, that we administer basically two statutes, the Shipping Act of 1916 and the Intercoastal Act of 1933. I would say that I would be more concerned with the ability of the administrative law judge to be able to gather the facts and present the facts in a reasonable fashion. There should be no great difficulty as far as the two statutes are concerned.

When you talk about a pool of administrative law judges, I would see no trouble with a pool of administrative law judges as it pertains to transportation matters, where you would have aviation, truck and rail, and maritime in a common pool of administrative law judges within the area of transportation, where they have a familiarity with all of the transportation statutes.

Mr. PERTSCHUK. Mr. Chairman, you touched on the only concern that we would have in the kind of scheme that you are talking about, and that is not specific knowledge of the FTC or its statutes, although clearly a knowledge of antitrust law or industrial organization economics would be helpful—but the really critical criterion would be the ability and experience in trying complex cases, and there, we impose no selective certification. We do not impose separate criteria for the selection of law judges.

And so, I would have no objection to—that is, speaking for myself—to a panel of administrative law judges who had general expertise in the trial of complex cases, especially those involving economic complexities, and industrial structuring organization. As you indicate, many of the SEC cases do.

Mr. GASKINS. Mr. Chairman, in terms of the cases that are of growing significance at the Commission, that is, merger cases and finance cases, I think that the idea of a consolidated independent corps makes a lot of sense. The expertise that the administrative law judges have, for example, at the FTC, is highly relevant to some of the issues that we face when we look at rail mergers.

Looking backwards, when we were dealing primarily with motor carrier applications, our work was so specialized that perhaps it really made sense to have people that had been through those processes several times. However, in terms of the future, I think that the notion of an independent corps of administrative law judges probably makes a lot of sense, as long as the group that is available to us has the general information about the transportation system and some of the antitrust concepts associated with merger policies.

Senator HEFLIN. I wanted to get into deregulation. The Interstate Commerce Commission is the only one of you that would be affected by that.

Do you feel that there is some sort of a need for an educational process of your administrative law judges, under, say, the Trucking Act?

Mr. GASKINS. The Motor Carrier Act of 1980 does not require a major change, primarily because we had chosen to diminish the role of the administrative law judges in the procedures. The pending rail bill may have a greater consequence, because we think that we will continue to use administrative law judges in rail

finance cases and other rail cases, and it may make some sense to take some time to lay out an education program that gets everybody up to speed fairly quickly.

Senator HEFLIN. Mr. Pertschuk, as you know, Chairman Cannon and Senator Ford have written the Federal Trade Commission, asking for a full written report of the facts surrounding the contract or the contention between the FTC and the former administrative law judge Hinkes. I don't intend to question you about this situation at this time, but can you tell the committee when the response from the Federal Trade Commission would be available?

Mr. PERTSCHUK. Yes, Mr. Chairman. As you know, the Commission has just returned from its August recess. But my information is that the Commissioners should be prepared to respond and the response should be at the committee within several weeks.

Senator HEFLIN. It may well be that we would want to, after receiving that, ask questions about that.

Do any of you see problems that could arise, other than the expertise problem, with an independent administrative law judge pool or corps?

Mr. PERTSCHUK. Mr. Chairman, as I think about it, I see one problem—which may or may not be a problem—and that is a recruitment problem.

It is very, very difficult to find lawyers with the kind of quality and ability to try some of the cases, consumer protection or competition cases, which the Commission brings. It really does require a very high level of competence, and the lawyers in private practice can now earn three times more, on the average, of what the administrative law judges trying those cases earn.

And I would think that an interest in the particular substantive law, an interest in the law of trade regulation, an interest in the law of consumer protection, is one of the attractions, one of the reasons why we have a number of ALJ's who began at the Commission and then, as their careers matured, became administrative law judges in other agencies, and then, when a vacancy occurred at the Commission, asked to return, because the cases are inherently interesting, and the material is interesting material.

I may display a bias there, and other cases may be equally interesting to those otherwise disposed, but I am concerned about the relationship between the ability to recruit those who may have an intellectual interest in the subject matter, which might be diffused by the knowledge that they would be assigned cases in any one of a number of different areas, which they may or may not have an interest in.

Senator HEFLIN. I'm informed that only 10 percent of those who apply to become administrative law judges eventually become ALJ's. Do you have any statistics indicating what percentage of those that applied failed to become administrative law judges?

Mr. PERTSCHUK. No. I can check to see if there are any such data and supply it to the committee. I don't believe that we have it, but I will check that out, Mr. Chairman.

Senator HEFLIN. Obviously as we're going through this, there are other questions, and we will submit them in writing.

[The following information was subsequently received for the record:]

FEDERAL MARITIME COMMISSION,
Washington, D.C., September 22, 1980.

Hon. HOWARD W. CANNON,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to the questions set forth in your letter of September 8, 1980, in connection with hearings by the Consumer Subcommittee on the subject of the Administrative Law Judge system.

Question 1. It has been suggested by some that the responsibility of ALJ's should be strictly limited to findings of fact and not include rulings on policy. In real life is this kind of delineation possible?

Answer. While this type of delineation may be possible, as most things are, I believe that it would be an inefficient system and would probably require changes to the Administrative Procedure Act.

As a practical matter, the trier of fact must be familiar with the law/policy relating to a case in order to determine which facts are relevant and material to the case. Facts cannot be gathered and sorted without such knowledge.

Since the trier of fact must, therefore, research the law/policy on a particular question in order to try the facts, it makes little sense for the agency not to reap the benefits of that research.

Moreover, both the Constitution and the Administrative Procedure Act require that parties have the opportunity to be heard on the law/policy issues in a case as well as on the facts. In addition, the APA contemplates an initial decision to which parties may take exception. This combination of requirements means that delineation of the law and facts would necessitate a three-step process in lieu of the present two-step initial/final decision. There would be findings of fact by the ALJ, followed by an initial decision on both the law and facts by the agency, followed by a final decision.

This procedure would not only be more cumbersome, more expensive and more time-consuming, but would not fully utilize the considerable legal skills of our Administrative Law Judges.

Question 2. In your opinion, would an independent corps of ALJ's under the supervision of the Administrative Conference make a difference in the quality of ALJ decision-making?

Answer. I don't believe that such an organizational change would have any bearing whatsoever on the overall quality of decisions rendered by the personnel affected by the transfer. However, if assignments to specific cases were made by the Administrative Conference so that the assigned ALJ had no experience of knowledge in a particularly esoteric subject, the quality of decisions might be affected.

Question 3. Why does the FMC no longer use selective certification? What has been the result of the elimination of this use?

Answer. We became convinced that selective certification restricted our access to the best available talent. Ironically, the only ALJ selected from the register subsequent to our elimination of selective certification was the former General Counsel of this agency. Obviously, he is an extremely well-qualified individual.

Question 4. How many complaints has the agency received alleging agency or industry bias by an ALJ on a case? Are motions to disqualify a common occurrence?

Answer. The agency has never received a complaint alleging agency or industry bias by an ALJ and there has never been a motion to disqualify an ALJ, to the best of my knowledge.

Question 5. It has been suggested that the agency heads provide policy instructions to ALJ's before the ALJ hears a case, leaving the fact-finding to the ALJ. Would you comment on this proposal?

Answer. Mr response to question number one is generally applicable to this question. There are both inefficiencies and legal problems inherent in this proposal.

In addition, it would be very difficult, in most cases under the Shipping Act, to provide meaningful policy instructions to an ALJ prior to the development of the facts. Section 15 of the Act, for example, authorizes the agency to approve anticompetitive maritime agreements that are not "contrary to the public interest." While this broad standard has been fleshed out somewhat by case law, the benefits and detriments of each agreement must still be weighed on an ad hoc basis. Only the most general type of policy guidance is possible.

I hope that these answers are helpful to the Subcommittee's efforts and stand ready to assist in any other way that you may deem appropriate.

Sincerely,

THOMAS F. MOAKLEY, *Vice Chairman.*

INTERSTATE COMMERCE COMMISSION,
Washington, D.C., September 25, 1980.

Hon. HOWARD W. CANNON,
Subcommittee on Consumers, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR CHAIRMAN CANNON: I was pleased to have the opportunity to testify before the Consumer Subcommittee on the Administrative Law Judge system on September 4, 1980. Enclosed you will find my responses to the follow-up questions submitted in your letter of September 8, 1980.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

DARIUS W. GASKINS, Jr., *Chairman.*

Question 1. As a result of the recent trucking legislation, you plan to reduce the ALJ staff. The CAB has faced this similar situation. You have suggested that some ALJ's may be sent on detail to other agencies. How do you avoid affecting the judges' independence if the recipient agency controls the length of the judges' stay?

Answer. The judges are detailed to other agencies only in circumstances which assure their independence. Periodic short term details now take place, but only through procedures controlled by the Office of Administrative Law Judges of OPM. In these procedures, OPM transmits the request from the borrowing agency to the ICC and fixes the duration of the detail, or "loan."

Because the ICC now must make a major reduction in its judge staff as a result of recent trucking legislation, we are trying to work out with OPM and other agencies, a new form of detail. In essence, the ICC is prepared to loan a number of judges directly to other agencies, including OPM, with the understanding that the detailed judges would be assigned full-time permanent positions at those agencies as soon as practicable. No probationary assignments are contemplated, and thus the judges' independence should be protected.

Question 2. I understand that ALJs at the ICC can draw from economists and other Commission staff for advice. What procedure insures that these staff do not participate in the prosecutorial function of the agency?

Answer. The most frequent use of staff expert advice by ALJs is of cost accountants, primarily for rate determination or railroad branch abandonment cases. Because of that frequency, the ICC has established a separate working group (Section of Cost and Financial Analysis) in the Bureau of Accounts to act as internal advisors to ALJs and to the ICC's staff opinion writers functioning as part of the adjudication decisionmaking process. The staff is structured formally to assist only in decisionmaking, and it does not participate in the posecutorial function of the ICC.

Less frequently, ALJs draw from economists, statisticians, or other Commission staff for advice, and these assignments are made on an ad hoc basis from the staff (such as the Office of Policy and Analysis).

In these instances the advisory experts are instructed that they are subject fully to the rules governing adjudication and may not participate in the prosecutorial function, ex parte communications, etc.

Question 3. In the Administrative Conference Statistical Report covering 1976 through 1978, it appears that a large number of ALJ orders appealed to the Commission were reversed. Does this show a need for review of ALJ performance? Could it reflect Commission enunciation of new policy?

Answer. The statistical tabulations shown in the July 1980 report of the Administrative Conference, particularly the tables at p. 211 showing affirmance/reversal effects of agency review, are not complete or accurate. Our staff will be in contact with the Administrative Conference staff to clear up whatever data reporting problems exist.

The ACUS tables show, for example, that during Fiscal Year 1978 the agency reviewed a total of 153 ALJ decisions in motor carrier cases, and reversed 30 of them, about 20 percent. That data is not correct. Our "ACUS Form 5" computer printouts for just the 2nd and 3rd quarters of fiscal year 1978 show 285 ALJ decisions reviewed by the agency in a 6-month period, and a 13 percent reversal rate. Further, if the full statistical universe of such cases is considered (731 case terminations for that 6-month period) the reversal rate was approximately 5 percent. No appeals of ALJ decisions were filed in 61 percent of the 731 cases terminated.

Our most recent "ACUS Form 5" report, for the four months ending June 30, 1980, does show a higher reversal rate—26 percent of the 76 appealed cases and 12 percent of all case terminations. As is suggested in the question, this higher reversal rate reflects the evolution of new agency policy during recent months. This does not

necessarily raise questions about the need for performance review of the ALJ corps. Once this period of transition has passed, it is expected that the reversal rate will decline.

QUESTIONS FOR PANEL OF AGENCY HEADS

Question 1. How many complaints has the agency received alleging agency or industry bias by an ALJ on a case? Are motions to disqualify a common occurrence?

Answer. The ICC does not maintian statistical records which would show a count of how many compliants are received alleging agency or industry bias by an ALJ on a case, and it is my understanding from staff that there have been very few, if any, such complaints. Motions to disqualify are not a common occurrence at the ICC.

Question 2. It has been suggested that the agency heads provide policy instructions to ALJ's before the ALJ hears a case, leaving the fact-finding to the ALJ. Would you comment on this proposal?

Answer. The primary vehicles that the Interstate Commerce Commission uses for giving instructions to Administrative Law Judges (ALJ's) are decisions of the Commission and regualtions and policy statements promulgated by the Commission. In most cases, the ALJ conducting the hearing in the context of historic Commission guidance and preparing an initial decision on the basis of that guidance and the underlying statutes, will provide the best forum for record development and decisionmaking.

The possible exception to this standard procedure would be complex cases with unique or precedential circumstances. In such cases, the Commission has begun the use of scoping orders to help the ALJ focus the hearing on those issues of policy or fact that the Commission believes would be most important. It is believed the scoping order can be particiularly valuable in cases where the policy guidance from the statutes, precedents, regulations and policy statements are particularly broad or where the policy direction of the Commission has recently evolved because of changes in conditions of the industry or changes in the objectives of the Commission.

A scoping order describing the principle policy concerns of the Commission will not prohibit the exploration of other issues if the facts of the case or the arguments of the parties lead the presiding ALJ to believe that such lines of inquiry would be fruitful.

FEDERAL TRADE COMMISSION,
Washington, D.C., October 3, 1980.

Hon. HOWARD W. CANNON,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed please find my responses to the questions posed for the hearing record by your letter of September 8, 1980. I appreciate the opportunity to address these additional points concerning the administrative law judge system at the FTC.

Sincerely,

MICHAEL PERTSCHUK, *Chairman.*

Enclosure.

Question. It has been suggested that the agency heads provide policy instructions to ALJs before the ALJ hears a case, leaving the fact-finding to the ALJ. Would you comment on this proposal?

Answer. I believe that this is an idea worth careful study. In at least one recent proceeding, the Commission accompanied issuance of a complaint with an order to the law judge instructing him to take evidence that would permit the Commission ultimately to decide the matter on either of two differing legal theories. *Boise Cascade*, Docket 9133. More frequent use of orders of this kind, that would elaborate upon the bare complaint and so aid the law judge in the conduct of the proceeding, is a potentially fruitful mechanism for guiding the process of fact-finding.

Question. You have suggested that even minimal involvement of the agency with the ALJ may create the appearance of bias. Would you agree with the concept of ALJ selection from the OPM register by an independent body other than the agency?

Answer. As I've suggested, our main concern with ALJ selection is that the judges who preside over the Commission's cases be capable of controlling the hearings and dealing with often complex legal and factual issues. The Commission has given our law judges a great deal of discretionary authority in the conduct of hearings, and therefore we need judges, like those we now have, who are fully capable of exercising that authority responsibly. We are much less concerned about the particulars of the selection process, so long as that objective is achieved.

Under the current procedure, an expectation of quality performance is the sole criterion for selecting new law judges, and the chief law judge plays a principal advisory role in making that decision. I would hope that under any change in the selection process, whether to a unified corps or to the concept of selection by an independent body suggested in your question, the agency would continue to have a role in explaining its needs and helping to assure that judges are selected who meet those needs.

Question. How many complaints has the agency received alleging agency or industry bias by an ALJ on a case? Are motions to disqualify a common occurrence?

Answer. Under the Commission's Rules of Practice, all motions to disqualify the Administrative Law Judge must be certified to the full Commission for a decision. 16 C.F.R. § 3.42(g). During my tenure as a Commissioner, I believe that there has been no such motion alleging bias by the law judge, either toward complaint counsel or toward the respondent. There have been a few motions that law judges be disqualified because of alleged breaches of the separation of functions provision of the Administrative Procedure Act, but even these are uncommon, and none have involved allegations of actual bias.

I am informed that such allegations have been made on rare occasions in the past. Research has turned up three exemples in the last 25 years in which the Commission rejected allegations of bias. *Indian Arts and Crafts,* Docket 8965, 84 FTC 428 (1974); *Eastern Detective Academy,* Docket 8973, 77 FTC 1628 (1970); *Surf Sales Company,* Docket 6612, 54 FTC 483 (1957). See also *Exxon Corp.,* Docket 8934, 85 FTC 864 (1975) (Commission denied a motion alleging that the ALJ had prejudged factual issues likely to arise in the matter by virtue of his prior service as a member of the litigation staff of the General Counsel's office). There is one case in which the Commission dismissed a complaint on the grounds that certain of the hearing examiner's rulings on admission of evidence and several of his critical comments "reflected on his impartiality." *Modern Methods, Inc.,* Docket 7568, 60 FTC 309, 340 (1962).

Questions of the Committee and Federal Communications Commission Answers Thereto

Question. What criteria must a candidate meet to be placed on the FCC's selective certification list?

Answer. As explained on page 9 of the Office of Personnel Management's Administrative Law Judge Examination Announcement No. 318, issued in October 1979, under the heading "Special Qualifications For Filling Certain Administrative Law Judge Positions," various Federal regulatory bodies[1] give prior consideration in filling these positions to eligible applicants whose administrative law experience includes participation in cases comparable to those coming before that regulatory body. To be placed on the FCC's selective certification list, a candidate must, within the seven years immediately preceding the date of this or her application, have had two years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of the record of such hearings, originating before governmental regulatory bodies at the Federal, State, or local level, in the field of communications law or public utilities law.

Question. Critics of selective certification say the practice leads to inbreeding among the agency's ALJs and limits opportunities for non-government applicants. In fact, does selective certification increase the number of ALJs at the FCC who have served on the staff of the FCC?

Answer. Selective certification has by its very nature resulted in the fact that the majority of the administrative law judges at the Federal Communications Commission has served on the staff of the FCC. Of the current corps of twelve, nine judges have had an FCC background. It is noted, however, that not all of these nine have had continuous service at the Federal Communications Commission. At the time of their appointments, two of them were judges at other agencies; a third was on the staff of yet another agency. Moreover, the agency has not limited its selection of administrative law judges to those on the selective certification list. Three of the last four appointees had no communications background, but rather were experienced judges in other agencies.

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[1] Department of Agriculture, Civil Aeronautics Board, Federal Communications Commission, Federal Energy Regulatory Commission, Internal Revenue Service, Interstate Commerce Commission, National Labor Relations Board, Securities and Exchange Commission, Social Security Administration for positions located in Puerto Rico, and the United States Coast Guard, Department of Transportation.

Question. Do you feel that there is an appearance of bias towards the agency if many ALJs are former FCC staff members?

Answer. I do not feel that the fact that many of our administrative law judges were formerly FCC staff members has in any way created an appearance of bias towards the agency. These judges are impartial and independent and have meticulously avoided trying cases in which they have had any prior dealings with any of the applicants. Moreover, they have uniformly imposed upon themselves strict standards of ethical conduct in their relationships with the Commission's staff involved in their cases.

Question. How many complaints has the agency received alleging agency or industry bias by an ALJ on a case? Are motions to disqualify a common occurrence?

Answer. To the best of my knowledge, no complaints have been received by the Federal Communications Commission alleging agency or industry bias by any administrative law judge, nor have motions to disqualify on other grounds been a common occurrence.

Question. It has been suggested that the agency heads provide policy instructions to ALJs before the ALJ hears a case, leaving the fact-finding to the ALJ. Would you comment on this proposal?

Answer. The Commission's designation order which commences the proceeding does spell out the parameters of the issues involved and does on occasion set forth a statement of the Commission's policy in a particular area. However, this in no way can be interpreted as an attempt by the Commission to influence an ALJ. Further, although the judges perform their responsibilities wholly without agency interference, they are bound by prior agency decisions in the same manner as United States District Court judges are bound by the decisions of the appellate courts. The responsibility of the FCC judges is to implement the will and legal mandate of the Commission as it has been formally expressed through the Communications Act and the Commission's Rules, policy statements and precedents. This limitation is fundamental to the administrative process and recognizes the essential fact that the agency has the ultimate responsibility for its decisions. Only by having judges who are independent from *ex parte* contacts, including any supervisory direction from the agency itself, can the public be assured that the judge's factual determinations and legal conclusions are based solely upon the record in a particular case.

FEDERAL TRADE COMMISSION,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., November 7, 1980.

Hon. HOWARD W. CANNON,
Chairman, Senate Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

Hon. WENDELL H. FORD,
Chairman, Subcommittee on Consumer Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MESSRS. CHAIRMEN: As the Commission advised you in its letter of September 8, 1980, this office was instructed to prepare, from the public record, the report you requested on the employment under contract of former Administrative Law Judge Harry R. Hinkes in an adjudicative proceeding, *Kellogg Company et al.*, Docket No. 8883. As you particularly requested, we examined in detail Judge Hinkes' participation in the case after his retirement as an administration law judge.

The report is enclosed. We hope that it is useful to your oversight functions. Should you wish a copy of any document or portion of transcript cited in the report, please let us know.

Sincerely yours,

HOWARD E. SHAPIRO,
Acting General Counsel.

Enclosure.

REPORT OF THE GENERAL COUNSEL ON THE EMPLOYMENT UNDER CONTRACT OF FORMER ADMINISTRATIVE LAW JUDGE HARRY R. HINKES IN "KELLOGG COMPANY ET AL.", DOCKET NO. 8883

This proceeding began on April 26, 1972, when the Commission issued a complaint charging the respondents with engaging in unfair methods of competition in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. The proceeding was assigned to Administrative Law Judge Harry R. Hinkes, who presided over all pretrial proceed-

ings and a substantial portion of the trial. In all, Judge Hinkes presided over four years of pretrail proceedings and more than 240 hearing days, amounting to more than 30,000 pages of transcript.

During the first week in August 1978 in a meeting with then Assistant Chief Law Judge Ernest Barnes, Judge Hinkes announced that he planned to retire by the end of the month. Barnes Aff. ¶ 1; Hinkes Stmt. 11, 35.[1] According to Judge Hinkes, the reasons for his decision involved the need to obtain medical treatment for his wife in California and the financial advantage that would attend prompt retirement. Hinkes Stmt. 11–15. During that discussion the possibility of Judge Hinkes' reemployment under contract was discussed, possibly at the instance of Judge Barnes. Barnes Aff. ¶ 2; Hinkes Stmt. 29. Sometime after this initial meeting, a second discussion may have taken place between Judges Hinkes and Barnes. Judge Hinkes reports that, in a telephone conversation, Judge Barnes proposed that he finish the case in California as a contractor. Hinkes Stmt. 14. Judge Barnes however, does not discuss this second conversation and asserts that there was no discussion of a transfer to California in his meeting with Judge Hinkes. Barnes Aff. ¶ 2.

At around the same time, Judge Barnes called Chief Judge Daniel Hanscom, who was in California, to inform him of the situation. Judge Barnes advised Judge Hanscom that Judge Hinkes was primarily motivated by financial reasons and that he would be willing to stay on the case under contract. Barnes Aff. ¶ 3; Hanscom Aff. 1. The two agreed that, in view of the fact that the lengthy case was nearing its conclusion, the contract idea had to be pursued. *Id.*

On or about August 9, Judge Barnes contacted Barry Kefauver, Deputy Executive Director, to alert him to the impending retirement. They discussed alternate ways of retaining Judge Hinkes, including the alternative of retaining him as a reemployed annuitant, but they concluded that one of the alternatives would provide enough remuneration to meet Judge Hinkes' wishes. Barnes Aff. ¶ 3; Kefauver Aff. ¶¶ 3–4.

Mr. Kefauver then began to look into the feasibility of a contract. During the week of August 6, he consulted with Charles Dullea, then head of the Office of Administrative Law Judges at the Civil Service Commission. According to Mr. Kefauver, Mr. Dullea agreed that "a contract was the only course to follow" if retention as a reemployed annuitant were not acceptable to Judge Hinkes. Kefauver Aff. ¶ 6. Mr. Dullea also stated, according to Mr. Kefauver, that he could not find anything dispositive on whether a former ALJ, retained under contract, could preside at a formal adjudication. *Id.* at ¶ 7. Mr. Dullea also stated that a contract would not have to be submitted to the Civil Service Commission for approval, although a request for reemployment of an annuitant would. *Id.* During this time Mr. Kefauver also discussed the projected contract with members of the staff of the General Counsel's office who were responsible for counseling on contract matters. *Id.* at ¶ 9.

On August 14, 1978, Mr. Kefauver met with Daniel Schwartz, Deputy Director of the Bureau of Competition; Peter Brickfield, Assistant Director of that Bureau; John F. Dugan, Assistant to the Deputy Director; and Barry R. Rubin, Assistant General Counsel, to discuss the situation involving Judge Hinkes.[2] The meeting was held in Mr. Schwartz' office soon after Mr. Schwartz learned from "members of the staff of the Bureau of Competition" that Judge Hinkes was planning to retire. Schwartz Aff. ¶¶ 1, 4, 5. Discussion at the meeting focused on the risk that if Judge Hinkes retired, a retrial might be required, at enormous additional cost, and on the

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[1] Source documents are cited as follows:

Barnes Aff.—Affidavit of Ernest G. Barnes, former Assistant Chief Administrative Law Judge, dated December 5, 1979.

Brickfield Aff.—Affidavit of Peter J. P. Brickfield, former Assistant Director of the Bureau of Competition, dated August 22, 1980.

Dugan Aff.—Affidavit of John F. Dugan, former Assistant to the Deputy Director of the Bureau of Competition, dated August 28, 1980.

Hanscom Aff.—Affidavit of Daniel H. Hanscom, former Chief Administrative Law Judge, dated December 5, 1979.

Hinkes Stmt.—Sworn Statement of Harry R. Hinkes, former Administrative Law Judge, given February 28, 1980.

Kefauver Aff.—Affidavit of Barry J. Kefauver, Deputy Executive Director and Contracting Officer, dated December 13, 1979.

Rubin Aff.—Affidavit of Barry R. Rubin, Assistant General Counsel, dated August 6, 1980.

Schwartz Aff.—Affidavit of Daniel C. Schwartz, former Deputy Director of the Bureau of Competition, dated August 18, 1980.

Tr.—Transcript of Proceedings in *Kellogg Co. et al.*, Docket No. 8883.

[2] Mr. Rubin states his belief that Anthony Low Joseph, one of the attorneys supporting the complaint in Docket No. 8883, also attended the meeting. Rubin Aff. ¶ 5. No other participant reports Mr. Joseph's presence. The Commission has instructed Mr. Joseph to file an affidavit of his recollection of the meeting, if in fact he attended. Order of October 9, 1980, at 7 n.7.

alternatives that would avoid such a risk. Brickfield Aff. ¶ 5; Dugan Aff. ¶ 6; Kefauver Aff. ¶ 10; Rubin Aff. ¶ 5; Schwartz Aff. ¶ 5. All participants at that meeting report that there was no discussion of the merits of any ruling that Judge Hinkes had made or might make in the case. *Id.* The meeting ended with the participants undertaking to perform research that would aid Mr. Kefauver's decision whether to pursue the contract alternative. Mr. Brickfield was to continue his research of the issue of retrial should a new law judge be substituted; Messrs. Schwartz and Dugan were to develop data on the cost of a possible retrial; and Mr. Rubin was to advise Mr. Kefauver on the contract itself. Schwartz Aff. ¶ 5.

Two days later, on August 16, Messrs. Schwartz, Dugan, and Kefauver met again. The cost of a possible retrial having been estimated at over $1 million, the participants agreed that the offer of a contract to keep Judge Hinkes on the case was the only real alternative. Dugan Aff. ¶ 8; Kefauver Aff. ¶ 14; Schwartz Aff. ¶ 7. There was no discussion concerning the merits of Judge Hinkes' rulings. *Id.*

Other consultations were in progress as well, during this period. Judge Barnes spoke with Mr. Dullea, of the Civil Service Commission, concerning a possible contract with Judge Hinkes. Barnes Aff. ¶ 4. Mr. Rubin also spoke with Mr. Dullea, having heard from Mr. Kefauver "that Mr. Dullea disapproved of the concept of paying a retired ALJ on a contract basis but informed [Kefauver] that it could be done." Rubin Aff. ¶¶ 2-3(a). According to Mr. Rubin, Mr. Dullea advised "that although he personally disliked such an arrangement there was no legal obstacle to it and that he knew of other situations in which it had been done." *Id.* ¶¶ 2-3(b). In early August Mr. Rubin had told Judge Hanscom and Christian S. White, then Assistant to the Chairman, that work on a contract was in progress. *Id.* ¶¶ 2-3(d), (e). Judges Hanscom and Barnes conferred, and Judge Barnes drafted a memorandum to the Chairman and Barnes conferred, and Judge Barnes drafted a memorandum to the Chairman recommending that a contract be offered. Barnes Aff. ¶ 5; Hanscom Aff. 1-2. Mr. Kefauver discussed the situation with Judge Hanscom. Kefauver Aff. ¶ 12. Finally, staff of the General Counsel's office and Executive Director's office were working on the details of the contract. Kefauver Aff. ¶ 13; Rubin Aff. ¶¶ 2-3(c).

On August 16, Judge Hanscom forwarded a memorandum to the Chairman, who, under Reorganization Plan No. 8 of 1950, is administrative head of the agency, recommending that a contract be approved. Judge Hanscom noted that Judge Hinkes had presided over all of the discovery in the case, complaint counsel's case in chief, and approximately one half of the defense case. The memorandum reported Judge Hinkes' intention to retire as of August 31, 1978, and suggested that Judge Hinkes, at 68 years of age and after many years of service as a ALJ, did not feel justified in working for the relatively small difference between his take home pay and his annuity. Judge Hanscom thus recommended that a contract be offered whereby Judge Hinkes could be compensated sufficiently to complete the case. The Hanscom memorandum requested a response by August 27, 1978.

On August 21, 1978, the Chairman approved the offer of a contract. He did so, he later stated, only after he had been advised that the contract proposal posed no legal problem and had been cleared with the Civil Service Commission. The Chairman adopted Judge Hanscom's recommendation because Judge Hinkes had presided over the case since its inception and so appointment of a substitute judge was likely to result in a substantial delay while the new judge reviewed the record.

On August 22 or 23, a new possibility was considered by Judge Hanscom and Mr. Kefauver: that Judge Hinkes might, under some circumstances, complete the case without a contract if he were moved to California. Judge Hanscom understood Judge Hinkes to be proposing that he would continue to preside over the case as a reemployed annuitant, instead of as a contractor, if the Commission would pay his moving expenses to Los Angeles. Hanscom Aff. ¶ 3-4. Judge Hinkes at points in his statement suggested that he would have been willing to forego the contract had his moving expenses been paid. Hinkes Stmt. 32-33. At any rate, Mr. Kefauver, after conversations with Mr. Dullea and with Jim Williams, the FTC's Director of Budget and Finance, concluded that paying the moving expenses would be "inappropriate and possibly illegal," so that alternative was not considered further. Kefauver Aff. ¶¶ 16-17.

Sometime thereafter, probably during the last week in August Judge Hinkes requested that the Chairman himself confirm that Judge Hinkes' continued service in the case was genuinely sought by the agency. Hinkes Stmt. 24. This request was relayed to the Chairman via Mr. Kefauver (Kefauver Aff. ¶ 18), and the Chairman made the call from his vacation place. *Id.* According to the two participants in that conversation, the Chairman stated his hope that Judge Hinkes would stay on the case. Separate Statement of Chairman Pertschuk, December 8, 1978, at 2; Hinkes Stmt. 24-25. They did not discuss the case itself at all. *Id.*

The contract was awarded on September 7, 1978. It contained provisions standard in government contracts (on "changes," for example, and "utilization of minority business enterprises"), including the customary clause permitting termination "for the convenience of the government." The contract specified the tasks to be performed by Judge Hinkes as follows:

"The Contractor shall conduct fair and impartial hearings, take all necessary actions to avoid delay in the disposition of the proceeding, and maintain order. The contractor shall perform all necessary duties required in presiding over such proceeding and shall have the same powers as a hearing examiner set forth in Section 556 of the Administrative Procedure Act and Section 3.42 of the Commission's Rules of Practice.

"The contract shall be divided among five tasks. They are:

"Task 1: Completion of presiding over remainder of respondent General Mills case in defense.

"Task 2: Completion of presiding over respondent General Foods case in defense.

"Task 3: Completion of presiding over hearing of remedy evidence to be presented by Kellogg.

"Task 4: Completion of presiding over the offering of rebuttal evidence by all parties.

"Task 5: Preparation of findings of fact and law in completion of initial decision in the matter of Kellogg et al., (Docket 8883)."

Judge Hinkes was to receive $10,800 upon the completion of each task except the first, for which the compensation was set at $3,600.

Judge Hinkes announced his retirement and the essence of the contractual arrangement at the beginning of hearings on September 7. His retirement was effective the next day. None of the parties raised any immediate objection, and Judge Hinkes continued the scheduled hearings. Tr. 34821–22.

In response to your request, the General Counsel's office has carefully examined every action by Judge Hinkes in the proceeding after his retirement. A chronology of these events is set forth below. In brief, Judge Hinkes presided over the taking of testimony from several witnesses for General Mills. He ruled on objections, received material into evidence, and posed his own questions to the witnesses. His only rulings on matters beyond this particular testimony concerned his own status and the status of Kellogg's defense case, after Kellogg declined to present its witness. (See discussion of the hearing on October 12, 1978.)

On September 8, complaint counsel was engaged in cross-examination of an expert witness for General Mills, Mr. Vincent R. LoCascio. At the beginning of the hearing that day, Judge Hinkes engaged in a colloquy with counsel over admission of a document sought to be used by complaint counsel for impeachment purposes, and over the adequacy of complaint counsel's contentions regarding the content of the document. Judge Hinkes agreed with respondent's view that complaint counsel should rethink his position. Tr. 34944–61. On nine occasions Judge Hinkes asked clarifying questions of the witness. He also overruled one of respondent's objections to a question and engaged in a colloquy with counsel over the relevance of another of complaint counsel's questions, ultimately withdrawn. Tr. 34964–35043.

On September 12, during the testimony of Richard Troxel, Judge Hinkes overruled complaint counsel's objection to the introduction of several of General Mills' exhibits. He sustained one objection by respondent to a question on cross-examination, and on eight occasions asked clarifying questions of his own. Tr. 35046–189.

On September 13, Judge Hinkes began the hearing with a discussion of the scheduling of Kellogg's witnesses. He then set a schedule, stating his concern that no open dates occur. Tr. 35192–213. During the continued cross-examination of Mr. Troxel, he sustained one of respondent's objections, overruled another, and asked clarifying questions on five occasions. Tr. 35213–73. Also on September 13, Judge Hinkes issued an order setting fees for the reimbursement of three expert witnesses.

On September 14, Judge Hinkes extended the period of in camera treatment for certain documents, upon General Mills' request. Tr. 35276–79. He then presided over the testimony of Rolf O. Berg, another General Mills witness. In the course of this testimony he received several of General Mills' exhibits into evidence; sustained several of complaint counsel's objections to the use of documents to which complaint counsel had not had access, despite a prior order and stipulation; sustained one of respondent's objections and overruled another during cross-examination; and, on five occasions, posed clarifying questions of his own. Tr. 35279–346. He closed this session with another discussion about the scheduling of future witnesses. Tr. 35347–52.

On September 19, Judge Hinkes opened the hearing by setting fees to be paid a witness for appearance at a deposition. Tr. 35355. Arthur A. Schulze, a General Mills Vice President, then took the stand. During direct examination, Judge Hinkes

received various exhibits into evidence, posed clarifying questions, sustained complaint counsel's objections six times, and overruled such objections four times. He also ordered a portion of Mr. Schulze's testimony to be taken *in camera*.[3] Tr. 35355–494.

On September 19, Judge Hinkes issued an order setting expert witness fees.

On September 20, complaint counsel cross-examined Mr. Schulze. Judge Hinkes sustained ten of respondent's objections to questions, overruled five such objections, granted complaint counsel's request that one answer be stricken, directed General Mills to produce documents relied on by the witness, posed numerous questions of his own, and received into evidence two of complaint counsel's exhibits. Tr. 35497–657.

On September 21, Judge Hinkes presided at the testimony of Edward K. Bixby, a General Mills Vice President and General Manager. He sustained one of complaint counsel's objections, sustained one of respondent's objections, and overruled one of respondent's objections. Tr. 35660–717.

On September 22, Robert M. Cameron, a quality control supervisor for General Mills, testified. Judge Hinkes asked clarifying questions on two occasions and overruled one objection by respondent. Tr. 35721–75. At the end of the hearing, he once more discussed scheduling of future witnesses with counsel. Tr. 35775–79.

On September 27, the hearing began with the attorney for Kellogg discussing the need for issuance of subpoenas concerning the contract with Judge Hinkes. Tr. 35782–84. Complaint counsel replied that there was no need for as immediate a decision on the subpoenas as Kellogg had requested. Tr. 35784–89. Judge Hinkes agreed with complaint counsel on the timing question and discussed in general the desirability for argument prior to the issuance of subpoenas. Tr. 35790–92. Judge Hinkes implied that argument and careful consideration of these subpoenas, dealing with his reemployment contract, were particularly important: "You are presumably doing this as the first step, as you say, the first bite, in a process that might result in a retrial of this entire proceeding." Tr. 35792. He then suggested that the problem of a costly retrial would arise only if objection were made, and he asked whether Kellogg intended to object. Tr. 35793. Kellogg's counsel responded that such a jurisdictional defect may not require objection. Tr. 35793–94. Judge Hinkes then asked for the views of General Mills and General Foods with respect to Kellogg's motion. Tr. 35795. General Mills stated that it joined the motion and further objected to a continuation of the proceeding. *Id.* General Foods took no position on the Kellogg motion. *Id.*

Judge Hinkes then denied Kellogg's motion to shorten the time allowed by the Commission's rules for response to a motion, though he expressed the hope that complaint counsel might be able to respond sooner than in ten days, the period allowed by the rules for such replies. Tr. 35795–96. At that point Kellogg asked that the proceedings be adjourned "until your Honor has either decided not to issue the subpoenas or there is a return on the subpoenas." Tr. 35797. General Mills joined that request. *Id.* Complaint counsel opposed adjournment. Tr. 35797–98.

Judge Hinkes thereupon denied the request for a continuance, stating as follows:

"Well, in any event, these are matters that have to be considered first of all by me and, of course, I cannot consider these issues until I have had a response from complaint counsel. I will act as expeditiously as possible; and in the meantime, however, I do not think it appropriate to halt these hearings particularly since we do have important witnesses scheduled to appear. These witnesses are not exactly available at call. Plans have been made for their appearance. I have asked the parties to be particularly careful to get these witnesses in from perhaps all parts of the world, in some cases, at specific times so that this matter can proceed and it has proceeded as expeditiously as possible, I believe.

"We are now approaching what I would hope is the termination of the hearings in this case. Certainly there is every expectation that within the next three months we may see the end of hearings, hearings that have already lasted more than two years. Under those circumstances, I think it not only appropriate but necessary that we continue, despite the question that has arisen concerning my status.

"As Mr. Rifkind has noted, the judge that has been hearing this matter for the past seven years is still hearing this matter. The title of that judge is of little importance I have found from personal experience over the past number of years; and in this proceeding, is acting exactly as has been his practice and habit without variation. If anything, with even less control from the agency than before in many respects—although I need not go into that at this point.

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[3] We did not examine the seven pages of *in camera* transcript (Tr. 35438–45) during preparation of this report.

"Under those circumstances, there seems to be very little justification for interrupting these hearings while the matter is being resolved. I shall therefore deny the request for a continuance." Tr. 35800–01.

The next witness was Frank C. Blodgett, Executive Vice President of General Mills. Judge Hinkes received several of General Mills' exhibits into evidence, sustained one of the complaint counsel's objections and overruled one, and posed questions of his own to the witness. Tr. 35802–73.

On September 28, the witness was John Livingstone, Director of Technical Services at Coopers & Lybrand. Again Judge Hinkes received into evidence exhibits of General Mills in connection with the testimony. He posed questions of his own to the witness, sustained one of the respondent's objections, and engaged in a discussion with counsel about scheduling matters. Tr. 35877–985.

On September 29, Judge Hinkes entered an order extended by two weeks temporary *in camera* treatment for certain General Mills evidence. On October 4, he entered another order setting fees.

Also on October 4, Judge Hinkes certified to the Commission Kellogg's motion for subpoenas concerning his retirement. He concluded that certification was appropriate because Kellogg's motion was directed "at the administrative discretion of the Commission effectuating my retirement and retention." Certification to the Commission of Kellogg's Motion for Subpoenas, October 4, 1978, at 2.

On October 12, a witness for Kellogg was scheduled to testify on the issues of remedy. However, Kellogg declined to offer the witness, stating that it was "inappropriate and unwise as a practical masttter to proceed with these hearings" until its pending motion to disqualify the law judge had been resolved. Tr. 35987–89. Judge Hinkes' response was as follows: "I am under obligation to move this hearing along and to finish this case. Until my orders change, that's what I am going to do. This hearing will proceed." Tr. 35989. Kellogg nevertheless declined to call its witness. Tr. 35990.

Judge Hinkes then discussed the disqualification motion, indicating that he was inclined to certify the motion promptly to the Commission. He invited comment from General Foods at that point. Tr. 45990–91. General Foods indicated that it would shortly move for Judge Hinkes' disqualification. Tr. 35991. In response to Judge Hinkes' question, complaint counsel said that the matter should be certified to the Commission immediately for its consideration. *Id.*

Judge Hinkes said that he would indeed certify the motion that day. "In the meantime, however, despite the reasoned arguments contained in these motions, I am not yet disqualified from acting; and until then, it is my intention to proceed with this case." *Id.* He then ruled that, because Kellogg refused to produce its witness, its case in defense was concluded. *Id.* Judge Hinkes explained that he saw no reason not to proceed with the remainder of the case, which he estimates could be completed within two months. In his view, because his disqualification might result in the need to rehear all of the witnesses in the case, there seemed little reason not to hear the remaining witnesses. He then set the next hearing day for October 24. Tr. 35992–95.

Later on October 12, he in fact certified to the Commission respondents' motions for his disqualification. He declined to disqualify himself. He stated that: "As to tenure, I am obligated to serve until the completion of this proceeding without interference from any source including the Federal Trade Commission." Order Certifying Respondents' Motions for the Disqualification of Administrative Law Judge, October 12, 1978, at 1. He noted that the contract payment was not in excess of his former salary and that his pension receipts amounted to a return of his own contribution, not additional compensation.

On October 18, he issued an order again extending temporary *in camera* treatment for certain General Mills evidence. This was his last action as presiding official in the case, for an October 20, 1978, the Commission stayed the proceeding.

On December 8, 1978, the Chairman stated for the record his decision not to seek Civil Service Commission approval of any employment arrangement with Judge Hinkes. On the same date, the Commission determined that Judge Hinkes had become "unavailable," within the meaning of Section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 554(c), upon his retirement on September 8, 1978. Holding that his service after September 8, once objected to by respondents, "was of questionable validity," and in light of the Chairman's decision, the Commission remanded for the appointment of a substitute law judge.

On December 11, 1978, Judge Alvin L. Berman was designated to preside over the *Kellogg* proceeding. Judge Hinkes, according to a letter and a memorandum he prepared to describe the work performed under the contract, aided the transition of the new ALJ by familiarizing him with the location of the files on the case.

On January 5, 1979, the Contracting Officer for the agency formally terminated the contract. In an agreement of settlement dated May 4, 1979, Judge Hinkes and Barry Kefauver, the Contracting Officer, agreed on a payment of $10,000 for Judge Hinkes' work under the contract.

Senator HEFLIN. We appreciate each of you being here. You have been a very informative and, I think, you have made a very candid expression of thoughts and opinions, and I appreciate it.

Our next witness is Judge Marvin H. Morse, the Director of the Office of Administrative Law Judges, and Margery Waxman, the General Counsel of the Office of Personnel Management.

Judge Morse, do you want to go ahead sir.

STATEMENTS OF JUDGE MARVIN H. MORSE, DIRECTOR OF THE OFFICE OF ADMINISTRATIVE LAW JUDGES, OFFICE OF PERSONNEL MANAGEMENT; ACCOMPANIED BY MARGERY WAXMAN, GENERAL COUNSEL; AND ROBERT MOLL

Ms. WAXMAN. Mr. Chairman, may I introduce Judge Morse, who is the Director of the Office of Administrative Law Judges—he is also a former administrative law judge—and Robert Moll from my staff

I want to thank you for your continuing interest in this area. As you know, it is very complex and very important to the administrative process, and we appreciate your interest and know of your particular expertise in dealing with the problems of Judges.

I am going to present our prepared testimony, and then Judge Morse and I will be happy to answer any questions you might have.

I appreciate the opportunity to present the administration's views today on those aspects of regulatory reform which deal with the selection and performance evaluation of administrative law judges. Before discussing why we believe opening up the selection process and establishing a periodic review for ALJ's will improve the administrative process, I want to make it clear that I know from personal experience of the high quality of the work performed by most ALJ's.

When I was in law school, I clerked for several ALJ's at the National Labor Relations Board and, when I was Executive Director of the Federal Trade Commission, my responsibilities included working closely with the ALJ's. I found in the ALJ corp some of the most dedicated and competent civil servants found anywhere in the Government. But I also learned first hand of the frustration of trying to remove or discipline those few ALJ's whose work was far below acceptable levels.

Like others who have worked with the regulatory process, I am convinced that high quality performance by ALJ's is essential to the integrity of that process. Ensuring such high quality performance is the purpose of the bills the administration has introduced, S. 755, H.R. 3263, and those bills which have been introduced by Senator Ribicoff, S. 262, and Congressman Hanley, H.R. 6768.

The administration's regulatory reform bill in the Senate is S. 755. This bill has been referred jointly to the Committees on Governmental Affairs and the Judiciary. The administration's regulatory reform bill in the House, H.R. 3263, was referred to the Committee on the Judiciary. Those aspects of that bill which relate to appointment and evaluation of ALJ's were taken from H.R. 3263 and were introduced as a separate measure, H.R. 6768, by Con-

gressman Hanley, Chairman of the House Committee on Post Office and Civil Service. This bill was referred to the Committee on Post Office and Civil Service and was reported out of committee with an amendment on July 23, 1980.

S. 262, introduced by Senator Ribicoff, was jointly referred to the Senate Committees on Governmental Affairs and the Judiciary. S. 262 was reported by Senator Ribicoff with an amendment on May 29, 1980.

The work of the regulatory agencies, as mandated by the Congress, reaches into almost every aspect of our life. As a result, the decisions of ALJ's affect the products we purchase, the planes we fly, whether we receive social security checks and what we will see on television. In the 34 years which have passed since the enactment of the Administrative Procedure Act of 1946, the level of Federal activity in the regulatory area has increased dramatically, almost geometrically. There is now a widely recognized need for new legislation to insure that regulatory activity continues to be responsive to the public and accountable to the Congress.

There are several bills pending in Congress designed to improve responsiveness and accountability in regulatory activity. These regulatory reform bills give ALJ's additional authority in shaping the record, clarifying the issues, and bringing hearings to speedy conclusions. As the authority of ALJ's increases, we must take whatever measures are necessary to assure that the ALJ selection process attracts the best qualified persons from all groups and that we receive the highest quality performance from ALJ's.

The enactment of the Civil Service Reform Act of 1978 signaled recognition in both the executive and legislative branches of the importance of improving the management of the Government. Specifically, Congress recognized that civil servants in highly responsible positions should be held accountable for the quality of their performance.

One major aspect of civil service reform was the creation of the Senior Executive Service, a cadre of top civil service managers, who would be rewarded for highly competent performance and removed for unsatisfactory performance. The underlying basis for the SES is also applicable to ALJ's.

Yet under current law, agencies' concern for the preservation of the independence of ALJ's and the ALJ's exclusion from performance evaluation under 5 U.S.C. Chapter 43 has caused the agencies to shy away from any evaluation of the quality of ALJ performance. As there is no other mechanism to evaluate ALJ performance, they are the only employees of the executive branch with virtual life tenure.

It is the administration's belief that no employee of the executive branch should be insulated from being held accountable for performance.

However, we recognize that any system for establishing accountability for quality of work must also preserve the necessary independence of ALJ's, which has been an essential element of the administrative process since the enactment of the Administrative Procedure Act of 1946. I will now address the most important features of the proposals currently pending in the Senate and House relating to ALJ's.

First, I will discuss transferring oversight of the ALJ program from OPM to ACUS. S. 755 and S. 262 transfer from the Office of Personnel Management to the Administrative Conference of the United States the responsibility to establish the qualifications for the position of ALJ and to adopt and administer a system of examining and selecting ALJ's. Although differing in mechanics, S. 755, S. 262, and H.R. 6768 all agree that performance appraisal should be under the direction of an authority within ACUS.

Congress designed ACUS to, among other things, study and evaluate the efficiency and fairness of the administrative process and to make recommendations to the agencies, the President, and Congress for improvement. ACUS is currently composed of a minimum of 75 members, including among others, the chairperson selected by the President and confirmed by the Senate, the chairperson of each Federal regulatory board or commission, the head of each Department, and no more than 36 other members appointed by the Chairperson of ACUS from "the practicing bar, scholars in the field of administrative law or government or others specially informed by knowledge and experience with respect to Federal administrative procedure."

ACUS' obvious familiarity with the nature of the responsibilities of the ALJ positions makes it the logical agency to establish qualifications for the positions, to examine for them, and, in order to assure that recruitment from all groups of qualified persons occurs, to widely disseminate information about ALJ positions. In addition, ACUS 'continuing role with the agencies and the ALJ's who conduct the agencies' proceedings makes it the ideal agency to be responsible for the evaluation of ALJ performance.

I know that some concern has been raised about politicization of the regulatory process by requiring performance review of ALJ's, but we believe that placing this function in ACUS and establishing an objective review process should go a long way toward alleviating those concerns.

The second area I will deal with is recruitment, examining, and selection—assuring that best qualified persons become ALJ's. Under the current system of recruiting, examining, and selecting ALJ's, we are concerned that many persons who would be effective ALJ's are either not seeking to become ALJ's or, having attempted to become ALJ's, are not succeeding.

First, the Veterans Preference Act with its "rule of three," by which only three names are certified to selecting officials, as well as its requirements for additional points for veterans where military service is likely to have occurred 20 to 30 years earlier, and its strict requirements for selecting a nonveteran over a veteran serves to limit appointment opportunities.

Second, the examining system is limited in its ability to assess the differences in types of qualifying experiences. For example, how do you rate Federal tax lawyers as compared to family lawyers as compared to State court judges? One's qualifications for becoming an ALJ are assessed almost entirely on a "paper" review.

Finally, once the decision to appoint has been made, it is virtually for life. Unlike other competitive service appointees, an ALJ is not subject to a probationary period or a performance review.

S. 755, S. 262, and H.R. 6768 propose improvements in these areas. All would require a fresh examination of the process of recruiting, establishing ALJ qualifications, and examining candidates. ACUS and OPM would work closely in these areas to assure true job relatedness. Selecting officials would be given more names of eligibles to choose from in filling their ALJ vacancies. Further, in order to enable selecting officials to be more certain of the abilities of candidates in specialized fields, the bills would continue what has been called "selective certification."

It is my belief that these bills present excellent opportunities to assure that the best qualified lawyers become ALJ's and will encourage applications from and selection of increased numbers of women and minority group members. I am also confident that these procedures would attract and provide opportunities for highly qualified applicants we do not obtain now—State and local government judges and State ALJ's.

Next I will discuss accountability—assuring high levels of performance. The administration proposed terms of appointment and the reappointment process based on performance after considerable deliberation on how best to evaluate ALJ performance. Maintaining ALJ independence was a significant factor in this decision, as the regulatory process must be kept free of political pressures. An annual evaluation of ALJ performance would not provide independence. An ALJ may handle relatively few cases in the course of a year, so it might appear that the ALJ's evaluation was based upon a particular decision in a case rather than performance as a whole.

We believe a term of office gives appointees an opportunity to become thoroughly familiar with the requirements of the position and reviewers a chance to measure performance over a significant number of cases while it is not of such long duration as to make review meaningless. A seven- to ten-year term also assures that in unusual instances where trail-type proceedings cover several year periods, there will still be an opportunity for performance review.

Thus, the job security of a term of years was selected as the best approach to enable the ALJ long enough time in which to demonstrate his or her abilities through performance. This approach, when added to the independence of ACUS and an objective review process outside agency control, I believe effects a good balance between protecting independence and assuring accountability for performance.

H.R. 6768 does not create terms of appointment, nor does S. 262 insofar as ALJ's appointed prior to enactment are concerned. Both bills do, however, create effective performance evaluation systems for all ALJ's. Under H.R. 6768, every ALJ would be evaluated by the ACUS Performance Review Board at least once every 6 years, while under S. 262 ALJ performance would be evaluated by the ACUS peer review panels.

These bills have scheduled evaluations at regular intervals in order to assure that the evaluations will be based on performance over a substantial period of time, and that the evaluations will not be perceived as being dependent upon or affecting the outcomes of particular cases.

As I have already discussed, the three bills all recognize the importance of preserving the independence of ALJ's while at the same time providing for a performance review. One of the ways this would be accomplished is by insuring that the review process is objective and completely free of agency or outside pressures.

S. 755 and S. 262 provide for a performance review by panels whose membership is at least half ALJ's. Moreover, these peer review panels would report to the Chairperson of ACUS, thereby assuring the independence of their recommendations. H.R. 6768 would create a three-member Presidentially appointed panel to review ALJ performance and to accept and investigate complaints about ALJ performance.

Although we would prefer the peer review of S. 755 and S. 262, we believe the House bill would also effectively accomplish performance review without impinging on the independence of ALJ's.

Under the Civil Service Reform Act, ALJ's may seek the assistance of the Special Counsel of the Merit Systems Protection Board when they believe that a prohibited personnel practice has been taken against them. However, none of the prohibited personnel practices refers specifically to ALJ's. H.R. 6768 creates an additional prohibited personnel practice which would gurarantee ALJ's access to the Special Counsel where they believe that an attempt is being made to interfere with their independence. This provision would be a worthwhile additional guarantee of ALJ independence. It should be carefully considered.

In closing I should say that the legislative efforts regarding ALJ's which I have discussed this morning have been designed to carry over to the ALJ program the spirit of civil service reform begun by the Civil Service Reform Act. I believe that we are already beginning to reap the benefits of civil service reform by increased emphasis on better management and improved employee performance.

These bills are designed to provide a system through which high levels of ALJ performance can be assured and to provide an efficient process by which qualified individuals have a full opportunity to become ALJ's. S. 262 and H.R. 6768 represent constructive responses from the Congress to the problem of insuring high quality performance while preserving the independence of the administrative process.

We in the administration believe that the differences in the approaches of S. 755, S. 262, and H.R. 6768 should be reconciled so that legislation can be enacted in this Congress. The Congress and the administration have an excellent opportunity to provide significant improvements to the administrative process. That opportunity should not be lost.

I will be happy to answer any questions.

Senator HEFLIN. Judge Morse, do you intend to make a statement, or are you just available for questions?

Judge MORSE. I am available for questions, Mr. Chairman. When we met last week with the subcommittee staff, it was my understanding that it was agreed that Ms. Waxman would represent the administration's position, and I would be available for discussion.

Senator HEFLIN. All right, sir. Do you know how many ALJ's have been removed for subpar performance?

Ms. WAXMAN. We think the number is about two or three so far. There are several actions now pending before the Merit Systems Protection Board.

Senator HEFLIN. Has there been a volume of any size of complaints as to performance?

Ms. WAXMAN. I think there has been reluctance on the part of agencies to bring actions against administrative law judges. Before the Civil Reform Act, agencies could only bring actions against employees based on conduct; actions were not brought on performance.

Under the Civil Service Reform Act, actions can be brought against Government employees based on performance, with the exception of administrative law judges.

Senator HEFLIN. Is there a breakdown on the figures showing the number of complaints that have been made against administrative law judges for industry bias and agency bias?

Ms. WAXMAN. There is no systematic way to keep numbers like that. However, we know there have been complaints because the reports of the Comptroller General and the Administrative Conference and the American Bar Association have shown that there is concern by the private bar as to the independence of ALJ's. There is also concern by the private bar as to the quality of some ALJ's. But there is no way to pinpoint any individual instances of complaints.

Senator HEFLIN. I would like to ask you a little bit about educational programs with ALJ's. Do you have any figures or statistics of those who have attended the National College of Administrative Law Judges?

Ms. WAXMAN. I think Judge Morse can answer that question.

Senator HEFLIN. All right.

Judge MORSE. Mr. Chairman, the present and most available educational opportunity for the administrative judiciary in the country today is the National College of the Judiciary, which is sponsored by the American Bar Association and which operates with both ABA and foundation funding.

The American Bar Association's National College of the Judiciary today operates approximately five courses during the school year specifically for the administrative judiciary. The programs at that school are largely the operation of the college administration and the Administrative Law Judges' Conference of the American Bar Association for which I happen to be the Chairman for this Association year.

We in the ABA are heavily committed to continuing education. Beyond that, the Office of Personnel Management is committed to the developing of educational opportunities for administrative law judges. Today, it is seriously utilizing and substantially utilizing the college which is located at the University of Nevada at Reno.

As I said, there are five courses. The courses include the handling of complex cases, the handling of benefits and disability cases, and then general administrative law programs. I would gage that the total student body on an annual basis is approximately 120 to 130 across these courses. A number of them, however, are from the States. They are not all from the Federal administrative law judge corps, so that we have probably about 70 administrative

law judges per year who are involved as students in these programs. I should add that there are a fair number of administrative law judges who are also involved in faculty positions.

In addition, several of the Federal agencies maintain an ongoing training program. The Social Security Administration four times a year conducts a 5-week course for new administrative law judges. The Office of Administrative Law Judges at the Labor Department has periodically—which is to say, more than once per year— conducted seminars. The Occupational Safety and Health Review Commission annually has a training program. The Federal Trade Commission has, on an occasional basis and most recently just this last month, conducted a very intensive course.

In addition, the Federal Administrative Law Judges Conference conducts an annual 2-day seminar, and the American Bar Association Conference, again, conducts the 1-day symposium here.

In addition, on an occasional basis, other agencies also conduct their own programs, so that the posture today is that there is great deal of commitment across the agencies to the ongoing education program, and we would hope to see this more intensified and more concentrated.

Senator HEFLIN. I suppose that continuing judicial education programs are like the church service, where the preacher is preaching, and the ones that need it the most don't come.

What is your feeling on some form of mandatory continuing judicial education?

Judge MORSE. My feeling, Mr. Chairman, is exactly in that direction. One of my own personal commitments, when I accepted this appointment this past spring, was to education. I have been involved with the school at Reno for some years, and I have, on a hypothesis basis, discussed with various folks the possibility of structuring a requirement that each administrative law judge, within the first year of service, for example, attend a training program for a specific period of time.

That, at the moment, is only in the talking stage. There are problems of funding, as well as the mechanical difficulties of structuring such a program, but I think we are in exact agreement on that.

Senator HEFLIN Well, of course, you talk about the National College. That is the one headed by Dean John Watts.

Judge MORSE. Yes; and I should say that we don't necessarily need to look in only that direction, although that has been the ongoing direction. I have initiated some discussions with people at other institutions.

Senator HEFLIN. That program has been very fine, I know, for State judges. A judge that goes there and comes back, is a far better judge. I assume the same is true for the administrative law judges.

The Federal Judicial Center of Federal District Judges operates a program with a required orientation program, and then continuing programs. They certainly have choices to be made by judges, structurally. Has the National Conference, of which you are the president, given some thought to a structure of judicial education?

Judge MORSE. Yes. As a matter of fact, I have had a very preliminary discussion with the director of education at the National Judicial Center, Mr. Ken Crawford.

Senator HEFLIN. All right, sir. If you can, maybe you can furnish something of that in writing at a later date.

I would like to have suggestions as to some structuring of a judicial education for administrative law judges. I want to ask you a few other questions, and any of you can answer this: Do you think there are functions now being performed by the administrative law judges that really don't fall within their role? Mr. Ferris indicated that he thought there were certain tasks that they were performing that really didn't require a well-trained administrative law judge.

Ms. WAXMAN. I think there are functions, as Chairman Ferris described, which do not have to be performed by administrative law judges, and certainly there are a variety of differences in terms of complexity. One of the things that struck me, when you were discussing the prospect of a pool of administrative law judges, was the fact that it might be possible to create such a pool of administrative law judges who were expert in regulatory proceedings, or have experience in complex economic cases—that that might not include the administrative law judges of the Social Security Administration.

What we have here is a group of 1,100 officials doing a variety of judicial functions, which range from fairly simple to quite complex.

One of the proposals that is being discussed in the Judiciary Committee, as you know, and in the Government Affairs Committee, is the establishment of administrative law examiners, who would be, in effect, trainees for administrative law judge positions, but would be capable of handling cases which are not of a complex nature.

I would certainly think that that flexibility exists within the system.

Judge MORSE. Mr. Chairman, if I may just add, the question, whether or not under a particular statute the decisional responsibility requires an administrative law judge or not, or whether there is room for the agency to make a policy determination as to the availability of alternate modes of dispute resolution, is a very difficult and complicated question.

When an agency asks us, for example, to authorize additional judge positions, and to fill those positions, the first inquiry is whether or not the caseload, in fact, calls for the utilization of administrative law judges or can permit an additional or different type of hearing mode. To the extent that there is a distinction available to an agency as between proceedings utilizing a judge appointed under title V, United States Code; namely, an administrative law judge, or using an alternate mode, the ultimate decision is essentially a legal question as to whether or not the statute calls for or reasonably comprehends the use of such a judge.

The question whether a particular means of dispute resolution requires a hearing at all is sometimes a different question, and the nub of it is that often the decision that there needs to be a hearing calls for the utilization of an administrative law judge, whereas the answer to the question whether there needs to be a hearing at all

may permit some alternate type of proceeding, such as expedited proceedings.

Senator HEFLIN. You mentioned the Social Security Administration in the testimony today on complexity of cases. My observation has been that in many cases, at social security the cases are extremely complex, particularly medical matters. They may well be more complex than some business or some trade matters. This idea of classifications of administrative law judges into a complex pool as opposed to a noncomplex pool has maybe some merit, and also has some demerits to it.

So I realize that this thing depends on where you are and what you're doing. And I suppose it is sort of like the person who says that if your neighbor loses his job, it's a recession, but if you lose your job, it's a depression.

So it depends upon what you are. As one person said, they didn't call that a serious operation, and he said, "Well, that depends upon whether they operated on you or me."

So I think that is involved in this issue, too.

Let me ask you this: In regards to pools, what is your feeling about an independent pool of law judges at which assignments could be made? It could well be that the pool would be divided by expertise. What is your personal feelings relative to an independent pool of administrative law judges?

Ms. WAXMAN. I think that is a very important subject for us to look at, and it certainly requires a great deal of study. I can see some advantages and some disadvantages to it. One result might be increasing independence of the ALJ's from their administrative agencies.

I think that, some people would consider that to be an advantage. I think other people would consider that to be a disadvantage.

The Administrative Procedure Act, as originally envisioned, conceived of ALJ's as very much a part of their agencies. Under the APA cases that are tried before ALJ's could also be tried before a member of the independent regulatory commission or board. In fact, ALJ's were seen as a means of taking the factfinding workload away from the agency board members and giving it to another person within the agency, who would make recommendations to the agency board or commission. Removing those ALJ's from their agencies and putting them in a separate pool would break that link with the Administrative Procedure Act.

Also, we would have to study the question of what kind of process would be used in assigning ALJ's to particular cases. The district court system, as you know, is a rotational system, and a new case goes before a district court judge according to the time when they are filed. That might not be useful in a situation in which you have, as you say, administrative law judges who are expert in the medical area; you might not want to waste their expertise and talents by having them assigned to an area where economic expertise is needed. So we might have to think about pools with economic expertise, and medical expertise, as well as a variety of other areas. I think that is one of the subjects that ought to be studied. Certainly the idea of a pool is one that ought to be given very serious consideration.

In making its proposals in regulatory reform bills the administration decided that what was needed right now was to tighten up the system, and to provide for performance appraisals for administrative law judges in keeping with the effort to strengthen the regulatory process and speed up the decisionmaking in administrative agencies. But we did not rule out the possibility of doing such a study on a pool at a later date.

Judge MORSE. Mr. Chairman, if I may just supplement what has been said about the opportunity for studying the pool concept, or a corps concept, I should say that several years ago, after extended discussion and study, the ABA's Conference of Administrative Law Judges did take a position in support of the concept, and it has not yet been adopted or considered throughout the ABA generally.

It is apparent that there would need to be new enabling legislation for that, but along these lines, I should say that there has just recently, within the past week, under present law been approval granted by the Office of Management and Budget to the establishment on a revolving fund basis, of a minicorps at OPM, to permit, on a very limited basis—and we're talking about not more than a handful of people, not as a step toward a corps, but for its own purposes, of a central body to more efficiently permit the utilization of a few judges for those agencies which have no judges, or which, on a very occasional basis, may be overwhelmed by the caseload.

Senator HEFLIN. There are complaints that I hear about agency reversals and modifications of findings of fact, or the application of the law to the fact of the ALJ decision, which, in some people's mind, the agency did. Perhaps policy determinations were involved.

Do you have any thoughts on the desirability of policy instructions being given to an administrative law judge at some stage before the decision is made by the administrative law judge?

Judge MORSE. Mr. Chairman, I served as an administrative law judge in three economic regulatory agencies, the Federal Power Commission, the Postal Rate Commission, and the Civil Aeronautics Board. In every one of those instances, the cases assigned included, to some degree or another, issues beyond mere factfinding, and required, in order to reach the facts, the resolution of policy.

In the resolution of policy, it seems to me appropriate and desirable to obtain policy direction from the agency, if, but only if, that policy direction is provided on the record, in the form either of an instituting order or some precedential pronouncement by the agency or by a court, as appropriate.

Now, I don't know if that is responsive to the point that you have in mind. But it seems to me that it is not only, as I say, appropriate, but necessary, if you will.

Senator HEFLIN. Well, we hear complaints that much of that is done, that they take the facts after the factfinding, and then really you are involved in the judicial function of applying policy, which could be done to give more independence and to be done more effectively in a sense of fairness, as to the facts and their relationship to a policy or to impressions of law, at an instruction or direction stage rather than the administrative law judge makes his findings.

Do you have any thoughts as to whether—I assume we are on the same—basically on the same wavelength. These things, of course, vary as to each agency, and the setting is a little bit different, and I think you have to do it, but the same is true in regards to courts. The judge instructs the jury in a criminal case; the judge instructs the jury in a civil case; the judge instructs the jury in many factors.

I am not really sure that there is basically, when you get down to it, as to the real issue, any real difference as to whether or not advance instructions at some stage wouldn't be helpful to the inherent fairness of the process.

Judge MORSE. Exactly, and both fairness and efficiency and soundness of decisions.

Senator HEFLIN. It could also save a tremendous amount of time. Now it may well be, that instructions have to be given, but I suppose that if it was given in the beginning, it would do away with a lot of unnecessary questioning on certain issues that might prove to be really relevant.

Ms. WAXMAN. Very often, regulatory agencies provide guidance and policy in the very act of deciding whether or not to bring a particular proceeding before an administrative law judge. These proceedings are brought by one part of the agency, usually the general counsel's office or an enforcement branch of the agency. In bringing the case before the administrative law judge, one part of the agency has made a decision that some action needs to be taken.

I think it is important to remember that it is the agency itself which makes the policy in the end, because it is the agency, the board members or commission members, who are responsive to the Congress, who are accountable to the Congress. Thus, policy in the end must be determined by the board members or commission members.

Senator HEFLIN. Well, I don't think there is any dispute that they have that responsibility and should have that responsibility. The question is at what stage in connection with an adjudication it ought to occur?

Ms. WAXMAN. I think, as Judge Morse pointed out, it is very important to distinguish policy from facts so we don't have a situation in which the agency is telling the administrative law judge which way to decide the facts in a particular case.

Senator HEFLIN. The Consumer Product Safety Commission currently does not have an administrative law judge; however, this Commission will need one in the near future. How would the Office of Personnel Management handle a request, we'll say, for a part-time ALJ?

Judge MORSE. You are asking, Mr. Chairman, as I understand it, whether or not we would accommodate a concept of part-time employment of administrative law judges; is that it?

Senator HEFLIN. In other words, they don't need a full-time judge.

Judge MORSE. Well, that's a different question. The Office of Personnel Management, and its predecessor, the Civil Service Commission, have, since the enactment of the Administrative Procedures Act, by regulations operated a service which, as contemplat-

ed by the act, accommodates the needs of agencies which do not have either judges at all or a sufficient number.

And the mechanism is quite simply that an agency makes a request for a judge or judges to preside at a case or several cases or a group of cases for a time certain and asks us to select a judge. In the case of assignment of a judge on a particular case or cases basis as distinct from a permanent assignment, we do not permit the agency to make the choice, so as to preclude judge shopping. And we make the selection from the cadre of judges with the agreement of the employing agency of the judge or judges being borrowed, and we then leave it up to the two agencies to effectuate a reimbursement arrangement. Typically, they do the reimbursement between them, but not always.

The illustration you provide is to the point, because only within the last 2 days have we received a request from the Consumer Product Safety Commission, which has not had a judge since its judge retired on February 29, for the loan of a judge. And indeed, I think yesterday I assigned such a loan.

Senator HEFLIN. To what extent does your office monitor the rotation of judges to various types of cases within an agency?

Judge MORSE. In the 4 months that I have been in this position, the question has not arisen. I would say that with the greater managerial initiatives which were provided as the impetus for my appointment at this position, that if a question arises, I think we would seriously look into it. And I am satisfied that, under the statute, we are the appropriate authority to police, if you will, the statutory injunction that cases be rotated within an agency as nearly as practicable.

Now, the latter clause, I think, reflects the judgment of Congress years ago that absolute rotation is not always a feasible managerial tool in judicial administration.

Senate HEFLIN. We appreciate your presence and your testimony.

That will conclude our hearing today, and we will adjourn until 9:30 in the morning.

[Whereupon, at 12:20 p.m., the hearing was adjourned, to reconvene at 9:30 a.m., on Friday, September 5, 1980.]

ADMINISTRATIVE LAW JUDGE SYSTEM

FRIDAY, SEPTEMBER 5, 1980

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE FOR CONSUMERS,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room 235, Russell Senate Office Building, Hon. Howell Heflin presiding.

Senator HEFLIN. We will start the hearing. Today we begin the second day of hearings on an important topic, the administrative law judge system. These hearings focus on the operation of the system, with particular attention on the departments and agencies within the jurisdiction of the Commerce Committee. Yesterday we heard from a panel of commissioners from some of the agencies under the committee's jurisdiction, and today we will hear from a panel of our administrative law judges. Each agency may have unique problems or situations that need to be considered.

We look forward today to testimony from the American Bar Association and a panel of law professors. Our first witnesses will be Judge William E. Fowler, Jr., Judge William J. O'Brien, Judge Reuben Lozner, Judge Ernest G. Barnes, and Judge William Fauver.

We are delighted to have you gentlemen with us today. Judge Fowler, I believe, is to lead. Thank you.

STATEMENTS OF HON. WILLIAM E. FOWLER, JR., CHIEF ADMINISTRATIVE LAW JUDGE, NATIONAL TRANSPORTATION SAFETY BOARD; HON. WILLIAM J. O'BRIEN, ADMINISTRATIVE LAW JUDGE, INTERSTATE COMMERCE COMMISSION; HON. REUBEN LOZNER, ADMINISTRATIVE LAW JUDGE, FEDERAL COMMUNICATIONS COMMISSION; HON. ERNEST G. BARNES, CHIEF ADMINISTRATIVE LAW JUDGE, FEDERAL TRADE COMMISSION; AND HON. WILLIAM FAUVER, CHAIRMAN, LEGISLATIVE COMMITTEE, FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE

Judge FOWLER. Good morning, Mr. Chairman and members of the committee. My name is William E. Fowler, Jr. I am chief administrative law judge for the National Transportation Safety Board. I appreciate the opportunity to appear before you and comment on the subject of the administrative law judge system being on the agenda of Federal regulatory reform.

The Office of Judges of the National Transportation Safety Board has jurisdiction over the certificate and licensing appeals to the National Transportation Safety Board. This activity has the responsibility for complying with title VI of the Federal Aviation Act

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of 1958, as amended, and derives its authority from the Independent Safety Board Act of 1974.

This activity is made up of administrative law judges, who among other duties and responsibilities, review on appeal the suspension amendment, modification, revocation, or denial of any operating certificate or license by the Secretary of Transportation under sections 602(b) and 609 of the Federal Aviation Act.

More specifically, the judges conduct formal proceedings involving petitions of review from applicants denied pilot and medical certificates by the Federal Aviation Administration. The judges also conduct formal proceedings on appeals from orders issued by the Federal Aviation Administration suspending or revoking certificates held by pilots, navigators, mechanics, dispatchers, air traffic controllers, air carriers, and air agencies authorized by the Federal Aviation Administration to perform aircraft maintenance and to certify aircraft as airworthy.

The hearings are adversarial in nature, and are conducted by judges as administrative trials de novo, and are held in courtrooms. All of our judges wear judicial robes while sitting in court.

In 1979, the Safety Board's administrative law judges made an impressive increase in the disposition of its cases. The six judges heard 317 appeals from airmen and issued 283 decisions, a total of 593 cases were closed. The number of administrative law judge decisions appealed to the Board in 1979 totaled 129. A substantial number of these cases involved medical certificates, deviation from air traffic control clearances, low flying, careless operations, and commuter airline operations.

In 1979, the Board received its first appeal from a Federal Aviation Administration order suspending an aircraft-type certificate. This case involved a McDonnell-Douglas DC-10 and an order issued by the Federal Aviation Administration grounding all 139 DC-10 aircraft flying in domestic service in this country following the fatal crash of the DC-10 American Airlines flight at Chicago. Although the case did not reach the full Board on its merits, a number of interlocutory orders were appealed to the full Board for review.

But the Board declined a request to bypass its administrative law judge. The Board also reversed the decision of its law judge to permit intervention in the case by an airline passenger association because the association according to the Board lacked "standing" under the Board's rules.

In comparison with other Federal agencies, the National Transportation Safety Board judges are somewhat unique in that they are empowered by the Board's Rules of Practice in air safety proceedings to exercise the option at the conclusion of the hearing to either issue a decision from the bench or to prepare a written decision after a review of the verbatim transcript of the hearing, exhibits introduced into evidence, and sometimes written briefs from the parties.

About 15 percent of the decisions issued by the judges are written, and the remainder are rendered from the bench on the same day of the hearing. The judges' decisions issued are initial decisions and are deemed to be the final decision of the Agency in lieu of an appeal being filed. Of the 283 decisions issued by the judges in

calendar 1979, 238 were rendered from the bench and 45 were subsequently issued in writing.

The caseload and case activities of the Office of Judges, National Transportation Safety Board, since 1974 have tripled, although the complement of judges has remained six in number.

While the judicial expertise and operational efficiency of our judges have definitely increased over the past several years, as witnessed by the increasing number of cases that are disposed of expeditiously, unfortunately the same cannot be said with regard to logistical support for the judges in our office. Because of recent budgetary constraints, there are now only three secretaries for the six judges. In place of two former fulltime law clerks, there is now only one part-time law clerk.

Steps should be taken to insure that administrative law judges have sufficient law clerks and secretarial help. In some agencies such logistical support is very poor. Giving such support to administrative law judges is the most economical way to increase their efficiency.

Turning to the subject of the administrative law judge system being on the agenda of Federal regulatory reform, some legislation now proposed would scrap the present system of merit selection and career civil service appointments for Federal administrative law judges.

In place of the present system these proposals would subject all Federal administrative law judges to to the autonomous authority of Presidential appointee. Present judges who hold career civil service appointments, subject to removal for good cause, would be deprived of their career appointments without cause and without consideration of their contractual or constitutional rights. Judges would be appointed for 7-year terms and thereby rendered susceptible to political and agency influence and pressure in connection with their decisions, particularly as the time for reappointment approached.

At the end of the 7-year term, 7 years after the effective date of such proposed legislation, the administration then in power could peremptorily fire all the 1,100 Federal administrative law judges now holding office without cause and replace them with political appointees.

Under the bill, new judges could be selected from the entire Judicial Register rather than from the top three candidates as required under current regulations of the Office of Personnel Management.

In addition to the 7-year term there are proposals containing provisions for bonus pay for administrative law judges and for evaluations and discipline of judges without adequate due process safeguards. The combination of those powers would seriously endanger the decisional independence established for administrative law judges by the Administrative Procedure Act and undermine the fairness and impartiality that has characterized our system of adjudication over the past 30 years.

The provisions for a term of years and for the reappointment process, now in these legislative proposals have been opposed by a wide spectrum of constituents. In testify before committees of the Senate and the House of Representatives considering regulatory

reform legislation, these proposals were opposed by the American Bar Association, the American Association of Retired Persons, the AFL–CIO, the National Association for the Advancement of Colored People, and a host of prominent law practitioners and law professors including Bernard Segal, former president of the American Bar Association, and Earl Kintner, former chairman of the Federal Trade Commission.

The past director of the Administrative Conference of the United States testified to the threat of decisional independence presented by such proposals. Charles B. Curtis, the chairman of the Federal Energy Regulatory Commission, testified similarly.

Elmer B. Staats, the Comptroller General of the United States, in testimony before the Senate Committee on Governmental Affairs, opposed the provision for a term of years for administrative law judges because he felt the judges would be exposed to undue political pressure in reaching decisions on cases before them, particularly toward the end of their terms when they would begin to assess their prospects for reappointment.

These types of legislative proposals operating in the guise of Federal regulatory reform would have severe adverse consequences on the millions of Americans who depend on administrative law judges for fairness and decisional independence under the Administrative Procedure Act.

We urge the committee to exercise the greatest caution when considering such proposals which could gravely affect the integrity of the entire Federal administrative process. The guiding principle to which Congress subscribed in its adoption of the Administrative Procedure Act of 1946, and to which I am sure we all subscribe, is that the system must insure that administrative law judges are allowed to function free from any encroachments upon this independence by the agencies whom they serve.

I greatly appreciate this opportunity to testimony before the committee today.

Senator HEFLIN. Thank you.

Judge O'Brien.

Judge O'BRIEN. Mr. Chairman and members of the subcommittee, as immediate past president of the Federal Administrative Law Judges Conference, I would like to express my appreciation for the opportunity to present my views on the administrative law judge system and the possible need for reform.

These are my views and not the views of my agency, the Interstate Commerce Commission.

As my biography indicates, I have spent most of my career with private industry, taking an early retirement in 1974 from the position of general solicitor for the Illinois Central Gulf Railroad in charge of all litigation before Federal and State administrative agencies.

Two other judges, one with another agency, have similar railroad backgrounds. Each of us left positions of considerable responsibility and higher salaries to become judges, each similarly motivated, in the prestige attached to the office, the indefinite tenure, and the assurance of independence in our deliberations.

As practitioners before the ICC for many years, we felt assured of fair and impartial treatment because of the high caliber and

independence of the presiding judges. The judge's proposed report or initial decision was based upon the record, governed by the law of the land. It was subject to close scrutiny by the agency and the courts.

If we disagreed with his or her decision, it was usually on the findings of fact rather than application of the law. Most important, in 99 percent of the cases, the judge's decision was served on the parties a relatively short time after the close of the record. There was no regulatory lag which is so frustrating to litigants.

As practitioners, we have always recognized that the administrative law judge serves an additional role, as public relations person for the agency. Rarely are Commissioners exposed to public viewing; in contrast, their judges travel near and far, to remote towns and villages, to preside in a fishbowl to make a lasting impression on those who sit in the hearing rooms. The impression must stem from demeanor, expertise, and independence.

What we as practitioners did not perceive was the handicaps under which the judges labored. As counsel for a major railroad, I had assistants to share in my legal research and my own personal highly qualified secretary. I understand that some agencies afford these luxuries to their judges but such do not obtain at the ICC. As of last week, the 436 judges were assisted by 5 legal advisers. Four or five judges share one typist, grade GS–6. Secretarial help as such is nonexistant.

I cannot overemphasize the necessity for the complete independence of the judge. While I may not agree with our chairman, who testified yesterday, regarding what he terms "a full range of support services for the judges including secretarial personnel" or "changes brought about by enactment of the Motor Carrier Act of 1980," or that the services of the ICC judges are expendable, there has never been any apprehension concerning our independent status as witness the two editorials from Traffic World attached to my biography.

One matter that deserves attention, which was the subject of a panel discussion at our last conference luncheon, is the use or abuse of administrative law judges.

While the Railroad Revitalization and Regulatory Reform Act of 1976, known as the 4–R Act, obviated to some degree the necessity for a judge's decision and the courts have held the modified procedure practice—that is evidence submitted on verified statements—to meet the standards of a hearing, the Commission has seen fit to relegate the judge in major rail cases to nothing more than a hearing officer, turning the cold record over to attorney advisers to prepare a decision based sometimes on policy rather than upon the evidence of record.

The modified procedure has become a vehicle to "grind out" decisions based upon testimony of affiants who might otherwise refuse to testify at an oral hearing. I had one such case recently in which after reading the verified statements, I set the cause for hearing. The result was that one of the two public witnesses failed to appear for cross-examination and the other refuted completely the written statement. While the Office of Hearings handles a few modified procedure cases, hundreds are shunted to the attorney-

advisers in the Office of Proceedings, the opinion-writing staff of the agency.

While perhaps not the cure-all for the shortcomings of the administrative law system, the corps concept is worthy of investigation and study by this committee.

I am convinced that the average administrative law judge is as capable as his counterpart in the district courts who handle a myriad of cases. For example, 2 years ago I heard a case involving the valuation of common carrier pipe lines at the request of the Chief Judge of the Federal Energy Regulatory Commission. Last month several of us heard cases for the Department of Labor.

The selective use of this talent by those directing the corps would insure fair and impartial treatment of litigation principally because our independent status would be fortified.

Thank you for the opportunity to speak to you.

Senator HEFLIN. Thank you, sir.

Next witness is Judge Lozner.

Judge LOZNER. Thank you, Mr. Chairman.

In this statement the views I express are my own and do not necessarily reflect the views of the Federal Communications Commission, with which agency I have been associated.

I might interpolate here, Mr. Chairman, that since the preparation of this statement, as of last Friday, I retired from the Government service after a rather long period. And so perhaps I speak here with even greater objectivity.

From my own rather lengthy Government experience, much of it as a member of the legal staffs of regulatory agencies and during the past 8 years as an administrative law judge, I have been able to observe at firsthand the ability and the performance of administrative law judges in the agencies with which I have been associated.

From my observation, I have concluded that by and large all cases, without regard to nature or impact, have been handled efficiently and expeditiously. Unquestionably, the outstanding performance of the judges in the conduct of hearings and in the decisions they write is a tribute to the manner in which the administrative law judge system has been and is operating.

At the Federal Communications Commission, which has a complement of 13 administrative law judges, our judges are handling an unusually heavy volume of cases, many of which involve complex issues and have a significant economic impact on individuals and the public at large.

These cases have been disposed of with dispatch consistent with due-process considerations. The hearings have been expedited and interim decisions have been issued promptly.

The cases over which the judges preside cover a wide spectrum, ranging from the determination of the justness and reasonableness of the rate charged for interstate communications services by such entities as American Telephone & Telegraph, Western Union and Communications Satellite; license renewals and initial licensing of AM, FM, and TV stations, as well as many other cases in the broadcast and common carrier areas.

While the judges' decisions in many of these cases have a great economic significance to the licensees, the applicants for licenses and the common carrier involved, even more importantly, from a

public interest standpoint, these cases have a significant impact on local communities and the public at large.

In view of the nature and significance of these cases, it is essential that the independence of the trier of the facts, the administrative law judge be insured. The integrity of the administrative law process is dependent upon the judges' independence and the realization by the general public and the litigating parties of that fact. Once the public and the litigants are led to believe that the judges are no longer independent, their confidence in the process will be eroded. It therefore behooves all who are concerned with maintaining the integrity of the process to resist the undermining of the independence of the judges whether by legislation, agency action, or in any other manner.

To assure a high level of performance, it is essential that in the selection of administrative law judges the procedures adopted will serve the purpose of seeking out the most qualified candidates for the position.

In this connection, I would say that over the years I have observed the functioning of the system by which administrative law judges are examined and selected. As I have indicated, I am of the opinion that the system has worked reasonably well. This is not to say that it has worked perfectly and cannot be improved.

As I am sure this committee is aware, many studies have been made of the examination and selection procedures employed by the Civil Service Commission and now the Office of Personnel Management. These studies have resulted in recommendations intended to improve the process.

However, I would urge that, before any changes are introduced, great caution should be exercised. Any alleged deficiencies in the system should be considered by knowledgeable people, and any recommendations to cure the deficiencies should be weighed carefully.

Before the codification of any changes in the selection process, comments should be solicited from all individuals and groups who have had experience with the administrative law process, such as sitting and retired administrative law judges, agency members—present and former—judges in appellate courts with experience in reviewing agency decisions, attorneys who have participated in administrative proceedings, law school professors teaching administrative law, and public interest groups.

In this connection, I would like to comment generally on studies that have been made relating to the work performance of administrative law judges. I would like to express a word of caution on the use of various statistical studies which have been made, presumably to analyze the judges' productivity.

While some analysts have attached weight to these studies, I am of the view that, without intensive and knowledgeable analysis, these studies have little or no value. It serves no purpose to develop statistics showing the workload and productivity of each Judge unless the analyst is fully cognizant of the nature of each case, the issues involved and their complexity, the nature of and the time spent in prehearing procedures, the length of the evidentiary hearing, and the problems involved in the particular case during the prehearing stage, during the course of the hearing and during the

posthearing phase prior to the issuance of a decision. The analyst should also be aware of the problems encountered by the judge in the preparation of his interim decision in each case. Without an analysis taking all of these factors into account, any workload study can have little meaning. And, to my knowledge, no study that I have seen has considered these factors.

Let me cite an example of how distorted a mere compilation of numbers of cases would be. At the Federal Communications Commission one of our judges presided over an American Telephone & Telegraph rate case in which the hearings extended over a long period and the issues were extremely complicated. The case required that the judge spend over a year in the analysis of the record and in writing the decision. This would show up in the statistics as one case.

On the other hand, other cases may involve issues of no great complexity, the hearings are short, and no problems are encountered with the writing of a decision. But in a statistical study with no case-by-case analysis, no differentiation is made between the complex and the simple case.

A word in conclusion, Administrative law judges share your eagerness to improve the administrative law process. To reach that objective, I would urge that you continue to bespeak the aid and assistance of the judges themselves.

Thank you.

Senator HEFLIN. Judge Barnes.

Judge BARNES. Mr. Chairman and members of the subcommittee, my name is Ernest G. Barnes. I am the chief administrative law judge at the Federal Trade Commission. I am pleased to appear today to discuss the recruitment, supervision, and retention of administrative law judges at the Federal Trade Commission and the independence of the administrative law judges at the Commission.

I have served as an administrative law judge at the Commission since December 1972, at which time I was appointed assistant chief administrative law judge. I was appointed Chief Administrative law judge in January of this year. I am the senior judge at the Commission in terms of length of service as an administrative law judge. Before becoming an administrative law judge, I worked for 17 years as a staff attorney at the Federal Trade Commission in various capacities: as an investigating attorney, a trial attorney, Assistant General Counsel, and Assistant Director of the Bureau of Competition. I have completed my 25th year at the Federal Trade Commission.

At the present time there are 11 administrative law judges at the Commission. Each of our judges has at one time or another served as a staff attorney at the Commission. Six of our judges were selected from the Office of Personnel Management's lists of qualified applicants, and five judges transferred to the Commission from other agencies. These judges were selected because of their outstanding qualifications based on their known performance over lengthy periods of service with the Commission as trial attorneys, appellate attorneys, supervisory attorneys, and advisers to the Commissioners.

These applicants all had a wealth of experience in the work of the Commission and their ability and dedication was established on the record. The Chairman of the Commission appoints the administrative judges, but in the past appointments have been made based in large part on the recommendations of the chief administrative law judge.

I am of the firm opinion that we have at the Commission a corps of highly qualified judges with wide experience in the work of the Commission. Their prior experience as staff attorneys has proven extremely beneficial in dealing with the complexities of Commission law enforcement. I have discerned no bias among our judges in favor of agency prosecutions; indeed, I do not believe that any such bias exists.

Our decisions are based entirely on our independent evaluation of the merits of our proceedings. This independent decisionmaking is a requirement of our position and we strictly adhere to it. I believe it would be a disservice to the public to eliminate from consideration as administrative law judges with the Commission those applicants who are best qualified to be decisionmakers by virtue of their past experience.

Recruitment of judges to serve at the Commission has never been a problem. As stated, we have a relatively small staff of judges. Further, the attorney staff at the Commission develops that experience which OPM recognizes as qualification for the position of administrative law judge. There are literally dozens of former Commission staff attorneys who have served or are now serving throughout Government as administrative law judges. I am contacted frequently by some of these judges inquiring if there is a vacancy at the Commission for an administrative law judge position.

Thus, there would be no difficulty in finding a highly qualified applicant for any vacancy on our staff that might occur.

The administrative law judges at the Commission perform their responsibilities wholly independent of the Commission. Applicants for positions as administrative law judges are examined and qualified by OPM. Once hired, the Administrative Procedures Act and the Commission's Rules of Practice assure the independence of the judge. We function completely apart from the Commission's legal and economic staff in preparing our budget requests, in determining our secretarial, clerical, and administrative personnel needs, and in requesting office and hearing room space, furniture, and supplies.

At every stage of our work, independence is assured. Thus, when a complaint is issued by the Commission, the matter is immediately considered to be in formal adjudication and is referred to the Office of Administrative Law Judges for trial. As chief judge, I assign the matter to an administrative law judge. The cases are assigned on the basis of rotation as far as practicable.

Once a case has been assigned, my involvement ends except in those rare instances when the assigned administrative law judge is not available and, as provided for under the Commission's rules, I am authorized to sign subpenas for the absent administrative law judge, or to grant procedural extensions of time, and so forth.

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No chief administrative law judge has ever suggested to me, directly or indirectly, how to decide matters of substance, and as chief judge I have never done so. In our office, drafts of orders or opinions are not routinely distributed to the chief administrative law judge. The administrative law judge assigned to a case is solely responsible for the trial of the matter. He schedules hearings, determines where and when trials shall be held, supervises the official reporter, issues subpenas, supervises and regulates discovery and trial preparation by the parties, receives and rules on all pretrial motions, conducts the trial, receives documentary and testimonial evidence, receives proposed findings and supporting legal memoranda, and writes an initial decision.

In all of these functions the administrative law judge exercises his own independent judgment. There is no interference by the Commission or by me or by anyone else in the carrying out of these functions.

We do, of course, follow the Commissions published Rules of Practice in conducting a trial. As trier of the facts and, in effect, as the lower court in the administrative process, we are guided by existing legal precedents from previous Commission and court decisions. Any directive we may receive from the Commission during a trial is in the form of an interlocutory order or of remand instructions. These directives are made on the public record. There are no ex parte directives or instructions of any kind from the Commission in any case.

I might add that the Commission in recent years has placed more confidence in its administrative law judges and has amended its Rules of Practice to place greater authority in the judges in the conduct of trials.

Interlocutory appeals are permitted only with the permission of the presiding administrative law judge. The conduct of pretrial and trial are within the discretion of the judge, and when interlocutory appeals are authorized, rulings are overturned only on a showing of abuse of discretion or of capriciousness. The presiding judge has complete charge of the discovery phase of the trial. In fact, discovery may be had only with the permission of the administrative law judge.

In sum, our independence is an accepted fact at the Commission and both commissioners and administrative law judges have made a positive commitment to preserve that independence as an institutional necessity. We are all aware that the credibility of the adjudicative process would collapse if there were any serious question about our independence. In my 25 years at the Commission I know of not a single incident in which anyone has even attempted to compromise this independence.

As for retention of judges, I am aware of three problems that have arisen within the past 10 years. In one instance, a judge retired during the trial of a matter and it was necessary to appoint a new judge who determined to hear the case over from the beginning. In another instance, a judge who retired during the middle of a trial agreed to complete the matter as a rehired annuitant. This procedure was approved by the Civil Service Commission and the rehired judge completed the case. And finally, there is the matter

of Judge Harry Hinkes, who retired before completing the *Kellogg* proceeding.

The complaint in the *Kellogg* case issued in 1972, and Judge Hinkes was assigned the case. Judge Hinkes made a decision to retire as of the end of August 1978, some 6½ years later. At that time, August 1978, the record in the proceeding consisted of approximately 32,000 pages of transcript of testimony and thousands of pages of exhibits and pleadings. The trial was within 4 or 5 weeks of completion when Judge Hinkes made his decision to retire. There would have remained the task of writing the initial decision, which would have been a substantial task because of the lengthy record and the complex and significant issues involved.

I would estimate that there was about 1 year's work remaining for the administrative law judge at the time Judge Hinkes made his decision to retire.

Then Chief Judge Daniel H. Hanscom and I were surprised at Judge Hinkes' decision to retire since the trial was nearly completed and the record that had been compiled was so extensive. It is my understanding that Judge Hinkes previously had made a commitment to Judge Hanscom to complete the case before retiring.

Since several million dollars had been invested by the Government and by the parties in this lengthy trial, Judge Hanscom and I believed that we had an obligation to attempt to persuade Judge Hinkes to complete the case. We did make such an effort. We attempted to get Judge Hinkes to change his mind and not retire. We attempted to get Judge Hinkes to complete the case as a rehired annuitant.

Failing in these endeavors, we recommended Judge Hinkes be retained under contract to complete the case. In fact, Judge Hanscom and I believed that we would be subject to much criticism if we did not make every effort to have Judge Hinkes remain on the case as the presiding administrative law judge. Judge Hinkes did accept a contract to remain as presiding administrative law judge on the *Kellogg* case and to complete the case.

The Commission, after respondents objected to this contractual arrangement, stayed further proceedings in the case. Thereafter, the Commission held that Judge Hinkes had become unavailable to the agency within the meaning of the applicable provisions of the Administrative Procedure Act upon his retirement and he was removed from the proceeding. Judge Alvin Berman subsequently was appointed to complete the case. Judge Berman has now completed the trial and he is in the process of preparing an initial decision.

Respondents in the proceeding have filed numerous motions with the Commission concerning the relief that they contend should be granted in light of the events surrounding Judge Hinkes' retirement.

The Commission recently ruled on most of these motions, but some currently are pending before the Commission for determination. I feel it would be inappropriate for me to comment on the particular facts and contentions that are now before the Commission. I know that this subcommittee is equally concerned to avoid even the appearance of involvement in an ongoing litigation. Any decisions which the Commission may make in the *Kellogg* case

respecting Judge Hinkes, or any other issue in the case, can be appealed to a Federal court of appeals.

Thus, respondents are assured of receiving full due process of law before any final order is entered against them.

In my view, I believe the Federal Trade Commission has a corps of administrative law judges that are competent, impartial, and independent. We perform our work wholly without agency interference, and certainly I, as chief judge, do not interfere with the decisionmaking. I believe the present system is working well.

Thank you for the opportunity to testify. And I shall be pleased to respond to questions.

Senator HEFLIN. Thank you, Judge Barnes.

The next is Judge Fauver.

Judge FAUVER. Mr. Chairman and members of the subcommittee, I am the chairman of the legislative committee of the Federal Administrative Law Judges Conference and a past president of that organization.

We appreciate very much this opportunity to present our views.

My statement is in two parts. The first deals with the need to preserve the judical independence of administrative law judges. The second presents proposed changes that we believe will improve the administrative justice system.

As we perceive its history, the Administrative Procedure Act was enacted in 1946 to insure fairness and due process in hearings before the Federal agencies. The cornerstone of this statute is its guarantee that the parties will have an independent and fair judge who will decide the case solely on the record, free from pressures by the agency, by special interest groups, and by the consideration of any other off-the-record matters.

Congress was presented with—but rejected—various proposals to limit the tenure of the hearing examiners, which was our original title, including a proposal that they be given a limited term of years and be evaluated for reappointment.

In a Yale Law Journal article, shortly after the passage of the act, Professor Thomas explained that congressional thinking in rejecting such proposals was that the guarantee of security of tenure was "the appropriate way to ensure that the examiners would be free from such subservience to their agencies."

In two recent cases, the Supreme Court of the United States has expressly ruled on the significance of the independent judgment of administrative law judges.

In *Butz* v. *Economou,* 1978, the Court applied the doctrine of judicial immunity to administrative law judges, holding that they have absolute immunity from suits for damages. The Court traced the history of abuses that led to the APA, and stated that under the APA "the process of agency adjudication is structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency."

The Court summarized the unique safeguards of the APA that combine interdependently to guarantee this judicial independence and impartiality. It then stated:

> In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighted by the importance of preserving the independent judgment of these men and women.

In *Nash* v. *Califano*, 1980, the second circuit underscored the breadth of the *Butz* v. *Economou* decision in upholding the APA safeguards for judicial independence of administrative law judges. The court below had ruled that a Social Security administrative law judge lacked standing to sue his agency to enjoin alleged interference with his judicial function, including an alleged program of monitoring, reviewing, and controlling the judge's decisions.

In reversing, the second circuit held that APA judges have standing to bring such a suit.

In the most recent Supreme Court case, *Jerrico, Inc.* v. *Marshall*, April 28, 1980, the Court rejected a contention that the Fair Labor Standards Act violated the Constitution by creating a risk of agency bias because of a provision that civil penalties were returned to the Labor Department.

It bottomed this ruling on its finding that the civil penalty cases provided for were tried by independent administrative law judges "whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime."

With this brief history of the APA, which is the Bill of Rights of Administrative Procedure, we submit that the first consideration of any changes in the administrative judiciary is that the APA safeguards for judicial independence be fully preserved and protected.

Experience has shown that the system has worked well and has confirmed the wisdom of Congress longstanding policy of protecting the independence and impartiality of administrative law judges.

Changes are needed to improve the system, and we recommend a number of these in our statement but it is paradoxical that the greatest threat to the APA system of administrative justice is the reform legislation now pending in the Senate and in the House.

S. 262 would change the APA tenure of administrative law judges to a limited term of years, with evaluation for reappointment, and would impose a system of periodic evaluations of all sitting judges.

H.R. 6768 rejects the limited-term idea, but would also require periodic evaluations of sitting judges.

Both S. 262 and H.R. 6768 would eliminate the APA's guarantee that administrative law judges have the right to a hearing on the merits of charges before disciplinary action can be effected, and would substitute, instead, a provision whereby an administrative law judge could be suspended or discharged before a hearing. We are strongly opposed to these bills and have proposed an alternative, discussed later.

We oppose the bills' provisions for evaluations of sitting administrative law judges, because we believe: One, such evaluations would lessen the parties' right to a fair and impartial hearing by interfering with judicial independence; two, the bills would create a new bureaucracy of experimenters trying to find ways to evaluate a highly sensitive judicial position that requires independent judgment; three, no record has been made showing a need for such experimentation; and four, the existing system works well and provides a flexible disciplinary mechanism to detect and correct any problems of judicial misconduct or unacceptable performance.

Administrative law judges play a crucial role in programs of high sensitivity to pressure and special interest groups operating both within and outside the Federal Government.

The senstivitiy of this position requires the utmost care in insulating the judges from pressure and other off-the-record distractions. This was recognized by Congress in 1946 and is reflected by the APA's carefully drawn safeguards, which have been recognized by the Supreme Court, for judicial independence and impartiality.

Indeed, evaluations were tried soon after passage of the APA, and the evaluation system was overcome by political and special interest influences to the extent that it collapsed amid public shame.

No need has been shown for experimenting with evaluations again. Nonetheless, we believe the present system can be improved, and we have proposed an alternative to the bills 'evaluation provisions.

We believe this alternative will strengthen the accountability of administrative law judges, while at the same time protecting them from prejudicial influences and unnecessary and unwise distractions and intrusions into their exercise of independent judgment.

We propose a Committee on Oversight of the administrative law Judge function—in OPM or ACUS— that would use a complaint model well proven in other judicial systems.

Now, the genius of this complaint model, Senator Heflin, is that you don't need to bruise every apple in the barrel to find a few bads ones. And this has been proven in many judicial systems in our country.

The committee would have authority to consider and investigate complaints against judges for misconduct or unacceptable performance and to refer them to a disciplinary body, the Merit Systems Protection Board, for hearing and appropriate action.

We propose the additional feature of committee authority to consider and investigate judges 'complaints against agency interference with the judicial independence, function, or status of an administrative law judge, with similar authority to refer such complaints to the Merit Systems Protection Board for appropriate action.

As the Nash and other cases show, the judges need an impartial forum in which to air grievances against unwarranted intrusions into their judicial function.

In addition to our proposal for an oversight Committee, there are a number of ways that we believe the system can be improved to achieve greater quality and efficiency in the Federal administrative process.

APPOINTMENT OF JUDGES

We recommend eliminating the existing system of "selective certification" of eligibles for the position of administrative law judge; and changing the existing rule of 3 to a rule of 10 for agency selection of a judge. We believe it is imperative that this system not be politicized and that the competitive merit examination be retained, including the written examination to test the ability to write a judicial decision.

TEMPORARY ASSIGNMENT OF JUDGES

We recommend a new program for better utilization of judges serving on temporary assignment with other agencies. The program has two interrelated features:

One. A minicorps, or small pool of judges, appointed by the Director of the Office of Administrative Law Judges in the Office of Personnel Management to serve in the OALJ. The corps will be used to help meet the temporary needs of agencies. This would be an excellent trial basis for determining the wisdom and feasibility of a larger corps of judges in the future;

Two. A volunteer roster. As a supplement to the minicorps, the Director, OALJ, would maintain a roster of volunteer judges, both active and retired, from which he or she can temporarily assign judges.

Safeguards are proposed to insure that an agency will not be able to preselect a judge for temporary assignment and that assignments will be governed by standards set by the Director. We also propose that the pay of retired judges on temporary assignment be limited to the differential between their regular salary and their annuity.

PAY OF JUDGES

Because administrative law judges are rightly exempt from the pay scales and bonuses of the Senior Executive Services, it is urgent that pay relief be accorded them to improve the Government's ability to attract and retain highly qualified attorneys for this position.

Judge Lozner, on this end of this panel, is one of the outstanding administrative law judges in administrative law, and I think if anyone interviewed him, they would find that the denial of pay relief for this judge was a major factor in our losing his services just last Friday.

We recommend that administrative law judges be removed from the General Schedule of pay rates and be accorded a separate judicial salary, subject to the authority of the Commission on Legislative, Congressional, Judicial, and Executive Pay.

In the interim, we recommend immediate relief by exempting administrative law judge from the asterisk pay ceiling imposed on the General Schedule of rates. It appears that administrative law judges are the only supergrades in the General Schedule of rates who are not subject to the SES bonuses or some other form of pay perquisites. They were overlooked when they made the change, and we urgently submit they be taken out of the General Schedule; and, in the interim, the asterisk be removed for these judges.

CONTINUING JUDICIAL EDUCATION

We recommend that funds be allocated as a budge-line item to enable each administrative law judge to attend at least one administrative law judge seminar or other comparable judicial education program conducted or sponsored by an association of judges or by the American Bar Association each year. Support for judicial education should not be left to the agencies to grant or deny as a reward or punishment of judges.

BENCH DECISIONS

To increase the efficiency of administrative proceedings, and, where appropriate, to avoid substantial and unnecessary expenses and delays involved in transcripts and posthearing briefs and proposed decisions, we recommend an amendment to the APA to clearly authorize the presiding judge to issue an oral bench decision if the judge determines that the evidence and issues do not require production of a transcript and the submission of written briefs and written proposed findings, conclusions, and decision.

In such cases, a transcript would not be prepared unless a party petitioned review of the judge's bench decision. Government contracts with court reporters could be negotiated to pay a lower fee when a transcript is not ordered, with an agreement to keep the tapes or stenographic notes of a hearing for a prescribed period to cover the time for possible review by the agency or the courts.

This change could result in millions of dollars of savings to parties and to taxpayers, as well as the reduction of substantial delays in the administrative process.

ENFORCEMENT OF SUBPENAS

To improve the efficiency of administrative hearings, we recommend an amendment to the APA to authorize the presiding judge to petition the district court for enforcement of a subpena or order to compel testimony or the production of documents.

Under the existing system in most agencies, a field hearing can be delayed or continued by resisting a subpena in order to testify, while the parties go to Washington, D.C., to argue the matter before the agency. The agency then decides whether to petition the local district court to enforce the subpena or order. This cumbersome and wasteful process would be eliminated by our proposal.

MOTION TO DISQUALIFY A JUDGE

We recommend an amendment to the APA to provide that an agency or court shall not review a party's claim of bias or other disqualification of the hearing judge unless a party shall first have filed an affidavit raising such claim with the presiding judge for a ruling before the issuance of his or her decision.

This provision would be limited to matters known to the party or reasonably ascertainable before the issuance of an administrative law judge's decision.

AGENCY REVIEW OF THE DECISIONS OF JUDGES

Here, Mr. Chairman, I refer to internal agency review of the decisions of the APA judges and not court review of the agency decisions.

Repeated, thorough studies have shown that the greatest cause of Government waste, delay, and inefficiency in administrative adjudications is excessive agency review of the decisions of administrative law judges. To effectuate recommendations of the General Accounting Office and others on this vital subject, we recommend agency review on a certiorari basis, and standards to prevent de novo review of findings of fact in adjudicatory cases.

To insure that agency review adheres to these reform standards, we also recommend that the selection of employee review board members be confined to agency members and administrative law judges.

I notice in S. 506, recently reported out of the Senate Judiciary Committee on the Fair Housing Review Commission, that the Judiciary Committee conceptualized review panels made up of a commissioner and two administrative law judges, which would indicate to us that there is no authority for that new commission to have employee review boards other than by commissioner and administrative law judges.

A UNIFIED CORPS OF JUDGES

We recommend that the Congress authorize a study of the feasibility and merits of establishing a unified corps of administrative law judges.

The basic idea of the unified corps is to assign judges to a centralized agency, such as the Office of Personnel Management or the Administrative Conference of the United States, to strengthen the judicial independence, impartiality, and efficiency of the hearings process, to make fuller use of the versatility of the judges, and to achieve other major improvments in the utilization of judges, facilities, and resources. Final decisional and review authority would continue to be reposed in the agencies.

The concept of an independent, unified corps of judges has been the subject of serious consideration for many years, and has been recommended by leading authorities on administrative law, including Bernard Segal, Earl Kintner, and Prof. Frederick Davis. We believe that the establishment of a unified corps of judges would be a major improvement in the Federal system of administrative justice.

Thank you.

Senator HEFLIN. Well, thank you, gentlemen.

Judge Barnes, according to a committee questionnaire, the Federal Trade Commission is the only agency within the committee's jurisdiction where all of the administrative law judges were former Federal Trade Commission staff members. Yesterday, Chairman Pertschuk indicated it might be a positive step for the administrative law judge system to have a better balance, with fewer former Federal Trade Commission staffers in the administrative law judge position. Do you agree?

Judge BARNES. I covered that, I thought, in my prepared statement. I feel that the judges we hired were the best qualified applicants for the positions at the time they were hired. We would certainly be willing to consider any applicant. We would look at the qualifications and consider anyone.

But to be honest with you, we don't get many members of the antitrust and trade regulation bar applying for jobs as administrative law judges. I think the salary requirement doesn't meet what these outsider practitioners want, and from within the Government, I think the people from the Federal Trade Commission and perhaps the Department of Justice would be the best qualified applicants for administrative law judge positions at the Commission.

Senator HEFLIN. If you had a trial court in a State court criminal division in which all of your judges were former prosecutors, would it have the appearance of independence?

Judge BARNES. I think the judges are independent.

Senator HEFLIN. I was speaking of the appearance.

Judge BARNES. The appearance may be there, Mr. Chairman. I would admit that. The appearance may be there. But I don't think in fact there is bias. I think, in fact, there is quality of applicants, and understanding the work, and more efficient and better decisions from qualified people.

Senator HEFLIN. The F 2 case I mentioned is the only regulatory agency under our jurisdiction in which all members of the administrative law judge system—come from within that agency.

It raises a question on its face. It almost raises a presumption and places the burden of proof to disprove it.

Judge BARNES. All right, Mr. Chairman, let me say this: This has not always been true; it has only been with the last 2 or 3 years that it has worked out that all the judges at the present time are former staff members. Judge Hinkes was not a former staff member. And I might say that five of our present judges left the Commission and went with other agencies.

Judge Mathias was with the Civil Aeronautics Board, Judge Parker was with the Drug Enforcement Agency, Judge von Brand served with the Social Security Administration and with the ICC, and then they came back to the Commission. So they have no particular bias with the Federal Trade Commission. Those judges can get jobs anywhere in Government. They chose to ask for positions with the Federal Trade Commission because they liked the work, and they knew the work, and they enjoyed it.

That's why we hired them. We didn't hire them because of any agency bias; we hired them because they are well qualified, efficient, hardworking judges.

Senator HEFLIN. All right, sir. We're delighted to have your position on that matter.

I think we want to start by asking some genera! questions. You mentioned the independent corps. We explored this yesterday with four agency heads. And I think we were rather surprised that none seemed to have any serious opposition to the concept of an independent corps of administrative law judges.

I think there were expressions, either elicited from the committee here or from themselves, as to some divisions within a corps. Some discussion of similar expertise, grouping administrative law judges that might have something related to business, securities, antitrust, Federal Trade Commission—that type of matters that might be put into a category; then in another category would be people of a lesser type, and then there was a division of complex as opposed to noncomplex type of cases.

I think there's differences of opinion that there should be no divisions. I would like to ask each of you to address an independent corps system. Tell us, in your opinion, the problems that you would see with it, the disadvantages and the advantages, if you will.

Judge FAUVER. If I may start, Mr. Chairman, there will be some problems. It will involve major reorganization of the present system. Personally, I would visualize the corps somewhat along the

lines of divisions like the medical profession. There would be a generalist division. Every member of the corps would be required to qualify for the generalist division and perhaps this would include disability cases, Government claims, and social security benefits.

Then I would visualize a credentials committee for various divisions of expertise, so that a judge would have to apply to that committee and show an interest and some background and experience to go into that division. For example, there might be divisions for ratemaking, for transportation, for economic competition and antitrust, and for safety and health matters, and so forth. And through a credentials process, I think, the judges could start sitting in with division judges. They could sit on the bench with them. They could counsel with them as to how those cases worked. In other words, some reasonable professional standards would be set up.

Now, at the same time, one of the major problems of an independent corps is going to be the distinction between adjudicatory work and rulemaking or policy work. The way I would suggest starting on that, is to dust off the Bork Report of 1977 in which the outgoing administration, the attorney general's ad hoc committee, recommended that various repetitious adjudicatory cases be assigned, to relieve the burden from the district courts, to administrative courts.

I don't think it requires an administrative court. I think it can be done by a unified corps. But the first step I would recommend is to identify along the lines of the Bork Report and others those repetitious adjudicatory cases that do not require the infusion of policy at the trial level.

This would involve tens of thousands of cases, such as accusatory hearings under the safety and health programs, civil rights cases, child labor violations, certainly disability claims and Government benefits, accusatory cases under the NLRA, delicensure proceedings involving SEC, commodities and futures, etc.

In other words, those kinds of cases that lawyers and judges can clearly recognize to be straight-out adjudicatory cases would go to the initial primary jurisdiction of this unified corps. The agencies would merely be one party among others appearing before the corps.

Where the problem comes in is that in hybrid proceedings and in rulemaking proceedings it's not easy to make a delineation between what is adjudication and what is the formulation of a policy or a rule. I would recommend on a trial basis that, where policy is recommended, the agencies could use the services of a unified corps administrative law judge as a special master.

And here, I would have a motions judge who would determine whether the case is adjudicatory or whether it is a special master case. I would have court review of his determination. Now, the agencies, then, would be using judges in policymaking cases as special masters, where I would not want the agencies to be bound by anything the judge came up with. In other words, we would have to set up a continuum. But for the great bulk of the work of administrative law judges, the adjudicatory cases, I would visualize this kind of an arrangement with the agency: The agency would

have to file a complaint with the unified corps. There would be a motions judge, and we had that back in Alabama, where a lot of work was done by one judge handling motions. There would be a case assignment, on a rotational basis, to a judge. The agency would be bound by the findings of fact of that judge, if they are supported by substantial evidence on the record considered as a whole.

After the judge's decision, the case would be subject to certiorari review by the agency, either sua sponte or on petition of the parties, but with certiorari review standards. That is, the agency should be concerned with agency policy, consistency of the judge's decision with agency rules, and it would have the final administrative decisional authority. As I mentioned with respect to cases that do involve the infusion of policy into the subject matter, the judge be a special master.

There are some of the general ideas that I would have on that subject.

Senator HEFLIN. What do you see as problems?

Judge FAUVER. First, the agencies—you had a remarkable event yesterday, and it really surprised me that you had at least two chairmen say they saw no problem with the unified corps. These agencies—I think if you survey all of them, most of them will have problems, because a policymaker wants to really control the whole shooting match. As Judge O'Brien has pointed out, they are using staff attorneys to handle a lot of cases over at ICC that probably should be handled by a judge. I think there will be resistance from the Administrative Conference on the idea of where policy should be handled.

But in the long run, I think it's an idea whose time has come. We have made a thorough study of this years ago. I headed a task force attempting to study this issue, and in our recommendation to the Civil Service Commission in 1973, we felt there would be enormous savings. In addition to economic savings, we would anticipate these kinds of improvements in the justice system:

Under the present system, when a party goes into a hearing room and sees the agency seal above the judge, he chokes, because whether the judge is fair—as all these judges I've ever met are—is irrelevant. There's the agency seal, right above his head, and it gives the impression that he's going to give more weight to the agency. You would get rid of that.

Second, judges tend to identify with programs. After all, these are very complicated programs, and the judge begins to become mindful of a lot of administrative burdens involving a particular program, whereas if you withdraw from the agency's program identity and you look functionally at the due process adjudicatory process, you don't have that kind of program identification.

And then the last one, which I think would be the greatest benefit of all of a unified corps, is that if you have a unified corps of judges, these judges will tend more to treat the agencies in the same way that a district judge treats the agencies in requiring articulation of their standards; that is, the corps judges aren't going to enforce an agency regulation that is not clear, that can't be understood in plain English, and that is a trap for somebody.

If you separate these judges you can hold these agencies much more effectively than they do today to a standard of articulation, so that agency standards will be clear, not retroactive, and not changing policy in midstream—something that can be adjudicated—and I think that would have a quality push on these agencies, to look much more carefully at the clarity of the rulings and the sense of what they are ruling on.

Senator HEFLIN. Give us a little more on how you think it would be—an independent corps would be a savings.

Judge FAUVER. Presently, if an agency has a peak load of cases and it wants to get a temporary judge, it has to go through OPM, under the OPM system. It's a beg-and-ask process, where the OPM will ask the different chief judges, "Can you lend us a judge?"

Of course, some chief judges do not want to acknowledge that they are not fully using their budget, or they're not fully worked. I think history has shown that there are problems where various agencies have denied the availability of judges to serve on a temporary basis. Also, there are agencies where at times judges are underworked. That is, where the case flow is not fully utilizing the talents of these people.

If you had a unified corps, you would eliminate that problem altogether, because when you have peak loads in one division or in one area, it would be picked up by other judges. All judges would have to be generalists. In other words, I think in terms of meeting case flow, anticipating management needs of a large volume of cases, you would have much more efficiency with a centralized agency.

Second, today it's difficult to find hearing space in various cities. Some hearing rooms go vacant because one agency wants to keep the hearing room. It's not sure whether it's going to use it or not. Whereas if you had a central system, all hearing facilities in these Federal buildings would then be subject to some kind of computer tracking and identification of filling the needs of these hearing rooms.

I think that the cross-fertilization of ideas, the idea of identifying broad, functional adjudicatory responsibilities, will enrich the career, will enrich the efficiency. I see cross-fertilizing ways where if judges are all working in one division, they can find benefits in meeting more frequently. Today, these agencies are pretty well spread out. We don't have that kind of cross-fertilization.

I think in terms of budget, where you have got one position, a judge, you have one agency, there should be bookkeeping and administration costs that would be saved by a centralized division.

Now, we don't say that we have the answer. We recommend a study. We do think it offers enormous prospects for validity and we recommend a thorough study of the subject.

Senator HEFLIN. Judge O'Brien, I was a little shocked to find that you need supportive personnel that is unavailable to you. How would you envision, under an independent corps, supportive personnel?

Judge O'BRIEN. I would expect to meet the challenge of the corps as we envision it, it would be that each judge should have his own secretary and legal adviser or a legal assistant. Maybe that's looking for the ultimate, but even two judges with one legal adviser

would be acceptable, because you can't be using them all the time, but certainly, he ought to be entitled to a secretary. And when I say a secretary, I mean one who acts as a secretary and not just a typist. And that's what we enjoy at the present time. It's a case of one typist to five judges, and that is very frustrating.

Senator HEFLIN. I did not mean to really divert you from the general questions that I asked of the independent corps—its problems, advantages, and disadvantages.

Judge O'BRIEN. I think, Mr. Chairman, when you have a wealth of material under one roof, so to speak, you are going to eventually find the corps has certain categories which will be one of the benefits to a corps; that you can pick and choose experts through those who have the expertise.

For instance, when I was practicing before the Interstate Commerce Commission, we had one judge there, Judge Boiserie, who was noted to be one of the finest, most knowledgeable grain men in the country. He was recognized by all the railroads as being not only well qualified but ultimately fair. As a result, whenever there was a big grain case, you knew who was going to hear the case. He had others that came along to succeed him when he retired.

We had certain judges who specialized in rail merger cases and had been very, very successful, and very capable. We have them in valuation cases. There is any number of categories that these judges can fit into; that being placed in a forum or a large group like a corps, you can take better advantage of them; as Judge Fowler says, cross-fertilization. I know that you have rate cases in many agencies, but there, you would certainly have experts in each one.

I feel that there's an awful lot to be said for the corps, and most of all, its independence.

Senator HEFLIN. Judge Fowler, would you express your opinion?

Judge FOWLER. Be happy to.

I think Judge Fauver has set out in very excellent and great fashion the advantages of the corps. I heartily concur with what he said. As a matter of fact, the great bulk of the work of administrative law judges is similar.

And in addition to that, the corps would provide a new high in utilitarian standards, where the utilization of judges are concerned.

We have already had quite a bit of that going on through the years, Mr. Chairman. I know many judges—certainly, I have, myself, been employed by several different agencies as a judge, civil rights cases, social security cases, labor cases, Federal highway cases, National Transportation Safety Board cases, Housing and Urban Development cases, Labor Department cases. I have heard all these type of cases, and I know many other judges that have.

So, I do not foresee the problems that many people think, where the unified corps of judges is concerned, where they should have different divisions, different type of case setups.

I think any judge worth his salt, with a little woodshedding, can handle most of the type of cases that come up before these agencies. We have judges who have gone all the way from the Social Security Administration to the ICC to the Federal Energy Commission, and so on.

So, I don't think there is a utilitarian problem, as such. As Judge Fauver alluded to, I think the greatest problems here are the agencies themselves. The agencies are somewhat reluctant to, shall we say, surrender their control over the judges.

Senator HEFLIN. That was certainly true at the Magna Carta.

Judge FOWLER. Very much so. Nobody likes to change the status quo, and everybody likes to say, "The way things are going for the past 10 years are fine; we don't need changes."

But I think it would be very advantageous, not only to the judges, but to the agencies, and certainly to the general public, where the savings of millions of dollars of funds were concerned.

It also would be inspiring to the judge, because if he has been at the Federal Power Commission, let us say, for a number of years, it might be a refreshing change for him to hear an ICC case or a Federal Trade case, or an National Transportation Safety Board case.

I have been fortunate. As I've said, I've heard at least a dozen different cases from different agencies, and it is stimulating. It does help. And I don't foresee any real problems in that regard. So, I am all for the unified corps concept.

Senator HEFLIN. Judge Barnes.

Judge BARNES. I would support the unified corps concept. I think the first problem it would eliminate, it would eliminate the perceptions which you have raised today about the Federal Trade Commission. We don't like for people to have these perceptions about us. They are not true, but we know they are there.

As far as hearing outside cases, I think I furnished the subcommittee with a list of outside cases that the judges at the Federal Trade Commission are now currently hearing. I made some notes here. Within the past few years, judges at the Federal Trade Commission have heard cases for the following agencies:

We have been special masters for the courts of appeal. We've heard Social Security cases, Consumers Product Safety Commission cases, Department of Labor cases, National Credit Union Administration cases, Federal Deposit Insurance Corporation cases, Comptroller General cases, Department of Education cases, Small Business Administration cases, U.S. Parole Board cases, National Oceanic and Atmospheric Administration cases, and National Labor Relations Board cases.

So, I feel that our judges are qualified to hear cases for any agency. I believe a corps concept would keep us more active, more interested. It would be very stimulating for us. So I favor a corps concept.

Senator HEFLIN. Just to give an illustration, do you think that you would have difficulty in trying a Social Security case on a medical disability in which there is a split of opinion between doctors as to whether or not the disease itself is disabling?

Judge BARNES. Well, some of our judges have volunteered to hear black lung cases for the Department of Labor. And those very issues come up in those cases every day.

I just yesterday read an opinion one of our judges wrote. He had heard a black lung case; he wrote an opinion. And these questions of medical evidence were deeply involved in that case. So I would say we have no problem with that.

Senator HEFLIN. Judge Lozner.

Judge LOZNER. Yes. From a slightly different viewpoint, Mr. Chairman, I have spent many years practicing as a trial attorney before State and Federal courts. I have been impressed over the years with the ability of trial judges to adapt themselves to all kinds of cases, sometimes more easily than others, but nevertheless there is that adaptability.

I feel strongly that the generalist and the generalist's experience applied to the judicial process serves the public interest.

I think in the administrative law field, as well, it's a danger, that there are too many specialists assigned to particular agencies, who can—and I feel should—be applying their experience and background to the broad spectrum of cases before the regulatory bodies.

I think a unified corps will serve this purpose, and it it seems to me that it will enhance the confidence that the public has in the process. We should be going in that direction.

Senator HEFLIN. There are other questions. I know Senator Ford has questions, but we have Congressman Breaux here, who has to catch a plane.

Congressman Breaux wants to testify—I don't believe he's here. Well, whenever he comes, let us know.

Senator FORD. Let me ask a couple of questions here.

Judge Barnes, how did you become chief of the administrative law judges at the FTC?

Judge BARNES. I have it here in my prepared statement.

Senator FORD. I didn't get in to see it. Just tell me, how long have you been at FTC?

Judge BARNES. 25 years.

Senator FORD. 25 years.

I want to ask you something. Is your pay the same as your other administrative law judges in the FTC?

Judge BARNES. That's correct.

Senator FORD. Are you at the Federal pay ceiling? Is that the reason you don't have more? Are you under a different category as far as pay scale is concerned?

Judge BARNES. No.

Senator FORD. They're all GS–17's or 16's?

Judge BARNES. They are all 16's. I am a 17. But it makes no difference in the pay.

Senator FORD. I understand, because we've got a cap on it.

Judge BARNES. That's correct.

Senator FORD. But you are on a higher pay scale being a Chief Judge?

Judge BARNES. I am a grade 17. My other judges are grade 16.

Senator FORD. All right.

Do you set the salary for your other administrative law judges?

Judge BARNES. No, sir.

Senator FORD. Who sets those?

Judge BARNES. They are grade 16's, and then they get their step increases.

Senator FORD. Automatically?

Judge BARNES. Automatically.

Senator FORD. Do you have full control over who you hire and who you do not?

Judge BARNES. I make recommendations to our Chairman.

Senator FORD. Has he ever rejected your recommendation?

Judge BARNES. No, sir.

I called Commissioner Paul Rand Dixon once when he was Acting Chairman, and I said, "Commissioner, we have a vacancy, and I would like to recommend a certain attorney for this position."

And he said, "That's all right with me. There's not going to be any hanky-panky here."

Senator FORD. That's when it gets to him. I'm not sure about you.

I knew this would get into the session somehow though.

Now, do you have the ability to assign parking spaces or offices and other "perks"?

Judge BARNES. We have been given 4 parking spaces for 11 judges. And I award the spaces. I award the four spaces—three spaces, I take one for myself. I award three.

Senator FORD. So you do have some ability——

Judge BARNES. Some.

Senator FORD. Do you assign the offices and that sort of thing?

Judge BARNES. I assign office space.

Senator FORD. How much office space do you have?

Judge BARNES. We have, I think, 42,000 square feet.

Senator FORD. I'm talking about you, personally.

Judge BARNES. I have one good-sized office, nice office.

Senator FORD. Ok.

Senator HEFLIN. I want him to look at mine.

Senator FORD. I just want to bring a point out, that even though you may be underpaid, you certainly have better facilities than many around Washington.

Judge BARNES. Presently; but only for about the last 2 years. We had kind of a running battle with our agency to get better space and to get better hearing rooms. Finally, about 2 years ago, we did get them. And we're completely satisfied now.

Senator FORD. I wish everybody was completely satisfied.

Now, the appearance problem that Senator Heflin brought up, even though in your own mind whoever comes before any one of your administrative law judges has an idea that, maybe, in the background that that ALJ did an investigation, did some work on a rule or a regulation. Don't they come in feeling like they're going against a stacked deck?

Judge BARNES. I don't think they do.

Senator FORD. You don't? They don't talk to you because you rule on their case; so they talk to us, we who do not have the ability to rule, you know. And not being a lawyer, I have the advantage that they talk to me more freely.

You do have people with a feeling that they are walking into a stacked deck at the FTC.

Judge BARNES. You know, being a judge, you make enemies in every case you handle.

Senator FORD. I know. But if you're an employee and you work in investigation, then all of a sudden they find you as an administrative law judge and that case comes up, or something similar to

that, several years later, they say, "Well, we remember him when he was one of the 900 lawyers at the FTC."

You are ready to defend your position; and I don't blame you. But I just think that the corps would eliminate any appearance of agency bias.

Judge BARNES. I agree with that.

Senator FORD. Fine.

Now, Mr. Fauver said something a moment ago about how the Chairman controls the whole shooting match, the Chairman approves every administrative law judge that you recommend. He can either turn him down or the Commission can.

Judge BARNES. I have no authority to hire anyone myself.

Senator FORD. You get three off the register; is that it?

Judge BARNES. That's correct.

Senator FORD. You make a recommendation, and your Chairman will scrutinize your recommendation before he agrees to it?

Judge BARNES. That's correct.

Senator FORD. So what Mr. Fauver was saying a moment ago was correct, the Chairman controls the whole shooting match. You get three names, you make your recommendation, and the Chairman may turn you down, by saying, "No, I want to look at the other two," or "Go get us another list of three."

Judge BARNES. We've done that.

Senator FORD. So the Chairman controls the selection.

Judge BARNES. Well, in a sense.

Senator FORD. In a sense. And you have to admit that, as a point of law, that whatever you do——

Judge BARNES. The Chairman has to make the appointment.

Senator FORD. All right.

Now, when the administrative law judge makes his decision, the Commission then makes a decision as well.

Judge BARNES. Our decisions are reviewed.

Senator FORD. By the Commission.

When it's reviewed by the Commission, what happens?

Judge BARNES. If the Commission enters an order against the respondent, that respondent has an automatic right of appeal to the circuit court of appeals.

Senator FORD. But can they dilute your decision? They can do anything with your decision they want to, can't they?

Judge BARNES. Yes, they can.

Senator FORD. So, if you get some kind of political pressure, they can make their own judgment. The Commission can make it weaker or make it stronger; right?

Judge BARNES. They can.

Senator FORD. So the Commission controls the whole shooting match.

Judge BARNES. They review our decisions de novo; change them, modify them, adopt them.

Senator FORD. Let me ask you this. In Magnuson-Moss rulemakings that are under your agency's jurisdiction, do you think an administrative law judge should sit on any of those?

Judge BARNES. We have one administrative law judge who is sitting on the *Children's Advertising* case. But we took the position at the Commission—the judges discussed this matter, and we decid-

ed we did not want to accept the rulemaking proceedings, because they are not APA hearings, they are not adversary proceedings in the true sense. We felt that we should stay away from the rulemaking proceedings because of your more intimate association with the staff. We felt we wanted to be judges and not presiding officers.

Senator FORD. Good. I think that's a good decision, and I applaud you for that.

I'm looking at the chief judge. He's got the white hankerchief in his coat. He looks like he's the chief judge.

You said at the ICC—I believe you named the judge, who is now retired, that had a reputation——

Judge O'BRIEN. That's right.

Senator FORD. A reputation of being a good judge and a fair judge. And everyone knew who was going to get the case.

Judge O'BRIEN. Correct.

Senator FORD. So he probably had a pattern, and those who practiced before him understood what he wanted and what he needed, and what he would expect, because he had a good reputation and had a reputation of being a fair judge. And wouldn't those who practiced before him know that their case would go to him—a grain case, I think you referred to?

Judge O'BRIEN. That's correct.

Senator FORD. Wouldn't that have a tendency to say to those who were representing a client before the judge how they would proceed?

Judge O'BRIEN. I think that's natural. They knew his expertise. They knew what would be required by him in the way of presenting the evidence. They knew what kind of witnesses they needed to impress him and knew what to expect in the way of decision.

Senator FORD. What I'm saying there is that you have got a pattern. There is a fellow that has a reputation among all the others who are employed, say, at the ICC. I'm trying to build a case here for the corps.

Judge Lozner, how long have you been an administrative law judge?

Judge LOZNER. Eight years.

Senator FORD. Are you retiring?

Judge LOZNER. I retired as of last Friday.

Senator FORD. You look too young to go out and sit on a veranda and sip mint juleps, which ain't all bad, and smoke Kentucky tobacco.

Judge LOZNER. I certainly don't intend to. I look young, I feel young. I certainly do not intend not to apply the experience and background that I've achieved over these years.

Senator FORD. Is the salary the main reason you have retired?

Judge LOZNER. It's a contributing cause, yes.

Senator FORD. Is it a fair question to ask you how much more you would have had to have to stay?

Judge LOZNER. I guess it isn't a fair question.

Senator FORD. OK. I'll withdraw it then. Since you're out, I think maybe you've already made a decision.

But the salary is a contributing factor.

Judge LOZNER. It certainly is.

Senator FORD. Now, let's get back to Mr. Fauver.

And this will be my last question, Senator.

You implied in your statement that it's difficult recruiting highly qualified persons to the ALJ positions, salaries are not competitive. Not competitive where?

Are you talking about here in Washington, D.C.? Or are you talking about Yellow Creek, Ky.?

Judge FAUVER. I'm talking, first, about competition with the legal profession in the Government and outside the Government. Outside the Government, I think a general scale of fees that are being made by attorneys who are into the same expertise as these administrative law judges, are considerably higher than the salary of the judges. Inside the Government, lawyers are making more than the administrative law judges, because they are subject to the SES, the Senior Executive Service, where they have pay bonuses. They have higher pay scales. So that's a disadvantage that we have in trying to compete with good legal talent.

Senator FORD. Are you in competition with other agencies within the Federal Government?

Judge FAUVER. I think each agency is, because the applicant makes his choice. If he is offered a position, he will decide which agency.

Senator FORD. But what about the salary? The salary is no competition as it relates to the Federal Government?

Judge FAUVER. The problem salary, interagency, is in the Social Security Administration, which I think has been a travesty over the years in treating those judges as GS–15's. Almost all the other judges are GS–16's. But for some reason Congress keeps the Social Security judges at GS–15.

Senator FORD. Let's talk about that just a minute.

Senator HEFLIN. Senator, could we let Congressman Breaux come in.

Senator FORD. Two minutes, and I'll be through.

Senator HEFLIN. All right. Go ahead.

Senator FORD. The total number of administrative law judges as of August 1980, is 1,103. Of that, 790 of them are outside of Washington, D.C.; 790, roughly 800 of them, which is 80 percent of all the administrative law judges that are outside this town.

Now, it seems to me that outside Washington, $50,000 is above the average income for qualified generalists in the legal field with some years of experience.

Now, in my State, for instance, there is a lively political fight for the commonwealth's attorney position. And commonwealth's attorney probably pays about somewhere between $28,000 and $32,000 And that eliminates any outside practice—that is 100 percent of his time. And there are a good many competent lawyers looking for that position.

Maybe there ought to be some sort of a differential based on whether they are employed in the D.C. area.

No one knows better than Senator Heflin and I how to get along in D.C. based on expenses, I had a rude awakening when I arrived in this town. When I pay $3.59 for a pound of coffee here and $2.89 at home, that's a lot of difference, you know.

Would it be bad if you made some kind of decision for the 300, and another kind of decision for the 790 or 800?

Judge FAUVER. I think, Senator, this goes to the issue that Congress has been looking at for years, and that is overall for Federal employees, should there be geographical differentials.

I don't think the administrative law judges should be singled out for geographical differentials.

What I say is that there is a tendency in the history of the Civil Service Commission and in both the Senate and House Civil Service Committees, to regard people issues as less demanding than corporate issues.

I think that can be demonstrated. I think the requirements to mete out equal justice in the social security cases—I have never had the privilege of working in social security, but I am past president of these judges and I do sincerely believe that there is this flaw in personnel pay scales in Congress, and certainly the Civil Service Commission.

If you look across the board, you will see a tendency to regard people issues as less demanding and somehow demanding of a less qualified judge than large, economic issues; and I defy that. I think that is wrong.

Senator FORD. Well, Judge, there are 654 Social Security Administration judges outside of Washington. And I just called a man this morning—after 6 years—after 6 years, to say that he has got his total disability claim. He got $58,000 plus and no telling what it cost the Federal Government to turn him down.

I told his father-in-law, because he is in the hospital with a heart attack, in intensive care, and probably won't live to know that he received his payment.

But here are 654 judges and it takes 6 years to get a claim through.

Judge FAUVER. I don't think that is a fair attack on 600 people, Senator Ford.

Senator FORD. I have got four offices in Kentucky, and 90 percent of my problems are trying to work out redtape and problems primarily in social security claims, black lung claims, and those sorts of things.

Judge FAUVER. I think the key to that problem is this——

Senator FORD. When I call, I get information. But when the claimant calls, they say, "We will call you back in 3 months."

Judge FAUVER. May I suggest what I think to you is the main problem in the redtape in the social security disability program?

Senator FORD. If you can tell me, I will try to start kicking and screaming—that's about all the seniority I have.

Judge FAUVER. The main problem with that whole procedure is that they first send the claimant to the wrong building. The claimant goes to the Federal Social Security Administration which has nothing to do with deciding his case.

Now, when he goes into the building, he is met by a clerk who is not qualified to interview on disability claims. He or she may feel the strength of the claimant's handshake, which is held against him, if he has got a good, strong handshake. He may be asked how he got there.

If he drove a car, that means he is available to do work driving a car, and so forth.

Then, when he leaves, the clerk sends his file over to a State office where he doesn't know that the State office is going to be deciding anything. Then, behind closed doors, State personnel decide his claim without seeing the claimant.

He gets a letter with the Federal Government letterhead on it—no wonder people are attacking the Federal Government—which is boilerplate gobbledygook that he can't understand——

Senator FORD. Be careful about attacking the states.

Judge FAUVER. But the point is, he doesn't understand this decision. He has been given a runaround.

The first time that anybody who is a decisionmaker listens to him is when he comes before an administrative law judge. That's why I think you have a tendency of people to appeal these cases and to really backlog a large volume of cases because they are not confronted with the decisionmakers in the field, and they don't understand those form gobbledygook letters they get from the wrong office.

I don't think the judges are responsible.

Senator FORD. Well, then they hire the attorneys to represent them, and they get 25 percent.

Judge FAUVER. Again, I don't think that affects the judges.

What I am saying is, is that I don't see the treatment of these Social Security judges as any different from any other judge, and that's my point.

Senator FORD. Well, that's fine, but I am just trying to say that it appears that we are losing more in Washington than we are out across the country.

Judge FAUVER. We also have them in Chicago, San Francisco, Houston, New York, and Boston—a lot of other really high rent districts.

Senator FORD. I am just saying, if you are in a high rent district, you have got to pay them for a high rent district.

But if we have got a system whereby you reimburse Federal employees for whatever area—when they go to Boston, when they go to Chicago, San Francisco, or Louisville, Ky.——

Judge FAUVER. There is another disadvantage to the American people by this pay differential, the way I view it.

And that is because there is a pay differential—for the Social Security judges, there is a talent drain out of the Social Security Administration into these other regulatory agencies.

And when people develop particular expertise as Social Security judges, really high talent and what have you, they are attracted by higher pay, by other agencies. And I think the claimants suffer from that.

Senator FORD. I thought everybody was subject to the cap, and we are at the cap.

Judge Barnes is a 17, but the 16 draws the same amount of money as he does because the Congress has put a cap on it.

Judge BARNES. There will be grade 14's now that will be at or near the cap.

Judge FAUVER. Mercifully, they are going to raise that cap some day.

Senator HEFLIN. Congressman Breaux is here. We haven't finished. There are several questions we would like to continue on later.

Congressman Breaux, if you could come forward and give your testimony.

STATEMENT OF HON. JOHN B. BREAUX, U.S. REPRESENTATIVE FROM THE SEVENTH DISTRICT OF LOUISIANA

Mr. BREAUX. Thank you very much, Mr. Chairman, Senator Ford. I appreciate the opportunity.

I do not intend to interrupt your orderly proceedings, but I do appreciate the chance to be here.

We are in session on the other body on a railroad deregulation bill, and I do appreciate the opportunity to sort of sneak in and present some brief comments which I thank both you and Senator Ford for your courtesies in allowing me to be on the program today and make some comments which I think are important.

And hopefully as a result of your committee hearings, we can all reach a common goal, and that is, the improvement of the administrative law judge procedure and system in this country so that it may receive the respect that I think it certainly deserves.

I think, first of all, your staff and your committee under your leadership and your vast experience in the judicial system are to be commended for your efforts in having these hearings to explore what can be done to improve the system and make it more responsive to the needs that it is designed to address.

This morning I would like to address my brief comments to some general recommendations for the administrative law judge system. In addition, I would like to supplement these suggestions that I have, with your permission, with some rather specific examples of what I think are incidents that have occurred that illustrate my concern and why I feel this Congress and through your leadership and this committee needs to take legislative action to address.

Specifically, I was referring to the case of the former administrative law judge, Judge Harry Hinkes which, to date, is still unresolved through a rather long period. Fortunately, the case that is known as Docket No. 8883, which the judge in this case was originally presiding over, known in the Federal Trade Commission as the so-called *Cereals* case, still has not yet been determined after 8 years of being considered by the Federal Trade Commission.

The essence, of the Hinkes matter is I think, pretty clear, and that, is that Hinkes announced in the public court one day he was going to retire after 6 years on the cereals case, but would continue to preside because he had entered into a contract with the Federal Trade Commission to continue to work.

That action, and a decision by the Federal Trade Commission on the Hinker matter, have led us to many, many problems to date, which pose a number of unanswered questions as to what are, indeed, the proper procedures, and how these matters should be carried out, and what is ultimately in the best public interest.

Questionable actions and decisions such as these impose serious delays, unnecessarily, on both the Government and the litigants and the taxpayers in the case. They have the unfortunate potential

of tainting or spoiling ongoing litigation because of possible mismanagement and poor judgment.

With these reasons, I feel there is a need for further inquiry, not necessarily at these hearings, because of your schedule and your plans. But I think there is a need for further consideration into the administrative law judge system.

At this time I would like to submit for your record an article which attracted my attention in this case. It was a copy of The Washington Post news article, dated July 20, 1980,[1] which covers, I think, in general terms several of the aspects of the *Hinkes* case.

Now, Mr. Chairman, the fact that an administrative law judge and a Federal agency entered into a contract to complete ongoing litigation brought about by that agency, despite apparently being warned against such action, requires, I think, steps be taken by this Congress to enfore and mandate enforcement of our rules and regulations.

The fact that such occurred also requires, I think, a clarification of vague statutes which outline the role an independent, objective—in this case, the Office of Personnel Management which was formerly the Civil Service Commission—has over the hiring assignments and the tenure of our administrative law judges.

Current statutes also need to be clarified and enforced which spell out how a retiring ALJ can be rehired, make it very clear so that there can be no problems in the future.

I would like to submit, Mr. Chairman, for your consideration a copy of an amendment which we on the House side are considering, was proposed on the House side by Congressman Don Albosta which would clarify and strengthen the rehiring of retired ALJs.

The amendment has already been adopted by the House Committee on Post Office and Civil Service as part of the bill H.R. 6768 by the chairman, James Hanley, which calls for the reform of the selection and oversight of administrative law judges. I recommend your consideration, as I know you and your staff are following what has occurred on the House side, and I would like to bring it to your attention.

I would like to submit also for the record, Mr. Chairman, two other documents, and these are public records. It is not anything that is not already a public piece of information. It is part of the hearing record on the House side. I think it would be helpful to at least have it for your hearing record here in the Senate.

One is a sworn affidavit by Charles Dullea, former Director of the Office of Administrative Law Judges of the Civil Service Commission. Another would be a memorandum by Mr. H. Patrick Swygert, who was former General Counsel of the Civil Service Commission, to Mr. Alan Campbell, who was Chairman of the Civil Service Commission and now serves as Director of the Office of Personnel Management.

I would like to offer for the record, and for your consideration, a copy of an in-house memorandum, again public, to Mr. H. Patrick Swygert.[2]

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[1] The article was not reproducible and is in the subcommittee files.
[2] The memorandum was not reproducible and is in the subcommittee files.

Each of these documents, Mr. Chairman, and Members, I think indicates the scope, the broad scope of the problem which I was addressing.

The thing that concerns me, Mr. Chairman, is the fact that a Federal agency—in this particular case, the Federal Trade Commission—has seemed to have shut off any participation by the litigants in the case as to investigations into the *Hinkes* case.

I think it requires some action to provide some sort of either interlocutory appeal or recourse to the litigants.

If a litigant's case before an agency is delayed or affected in any way due to technical problems or administrative decisions or administrative mismanagement, I think it is only proper that the affected party or potentially affected parties be allowed to enjoy some due process of law, namely, the right to participate in cross-examination, question people in the process.

As you know, your colleague here in the Senate, the Honorable Carl Levin, has introduced legislation which would amend the United States Code to allow for appeals from interlocutory orders on assignment or conduct of an administrative law judge.

I think this is an important step which is needed to correct problems which have arisen from an administrative law judge case and which could and does affect ongoing litigation.

The fact that a Federal agency can investigate itself for possible impropriety or wrongdoing, I think requires steps that provide for legislation or some regulatory action to prevent those involved in a case from investigating themselves or determining the outcome of these investigations.

In this case, we witness a number of ALJ's recusing themselves from the investigation. I think that is proper.

I do not see the Chairman of the FTC recusing himself until about 2 years later. We do see the FTC asking Judge Hinkes' replacement in the *Cereals* case to investigate the Judge Hinkes' situation. Thankfully, this administrative law judge had the responsibility and the good judgment to recuse himself because of possible conflicts of interest.

I wish Senator Ford was still here.

We had a situation back in my district, for example, of a story. A fellow's wife had accused him of running around, and he said, "Look, I will take it up, and I will give you an answer in the morning." He was investigating himself.

It is a very simplistic example. I can just imagine saying that, that I will have an answer for you in the morning, don't worry about it.

I think I've just about concluded the last couple of paragraphs. In addition, I think, Mr. Chairman, the question arises, the FTC in the *Hinkes* case may have properly overlapped several agency functions with the outcome being that those responsible for prosecuting may have directed important agency decisions in the very case that was at hand. It is believed negotiation, discussion, and formulation of the Hinkes contract involved a number of FTC divisions.

If such is the case, one wonders what the FTC's purpose might have been in opting for the Hinkes contract. There must be some type of procedural method established which automatically requires that an independent investigation is begun and carried out

in these types of cases in a just and expeditious manner. If not, then we could continue to face the problems in the future which have arisen with the handling of the *Hinkes* case.

Mr. Chairman, your committee is absolutely correct in consideration of the need for Federal regulatory reform within the ALJ system. I think corrections are needed. I think further investigation into the system in these type of problem areas need to be carried out. I believe legislation which clarifies and enforces the hiring of retired ALJ's is needed as part of the effort to reform the system.

I think serious consideration must be given to a more effective and selective method of assigning ALJ's to various agencies, especially to those where they were employed previously, in order to prevent possible potential conflicts of interest.

I would recommend that there be an improved method of investigation of the ALJ problems in cases by an outside, independent individual or group which has no ties nor any possible conflict of interest, in order to prevent the agencies from being the sole source of their own investigation in these types of cases.

Mr. Chairman, I think under your leadership and particularly with your vast experience and judicial views, you have a golden opportunity to try to suggest some corrections which can go a very long way towards removing any serious doubts that many Americans might have today in the justice that is being dealt out by the administrative officials as well as the court systems in this country. I think that you are certainly on the right track. And I will commend you for it, and will submit these as hopefully helpful suggestions.

Thank you very much.

Senator HEFLIN. Thank you very much, Congressman Breaux. On the Hinkes matter, the chairman of this committee, Senator Cannon, and Senator Ford as chairman of the subcommittee, have previously written the Federal Trade Commission asking for an explanation. We will, after receiving that, make determinations of what type of investigation we will conduct.

So that's a matter that will be addressed after the written explanation is received.

We appreciate your appearing here, and your other suggestions.

Mr. BREAUX. I appreciate your courtesies, and also that of your staff. Thank you, sir.

Senator HEFLIN. Thank you.

JUDGES PANEL—Resumed

Judge Fauver, if you will come back. I am interested in this concept of how an administrative law judge tribunal acts where there is adjudication but yet an infusion of policy. I believe you used the word "infusion" of policy. And how it could be handled. It is my understanding—and I know very little about it—but the CAB, Civil Aeronautics authority, that this—they have made steps to try to have the administrative law judge in his adjudication of facts also to, in effect, apply the facts to the policy, or apply policy to the facts, by having an advance—that in advance of hearing, that in advance of decisionmaking by the administrative law

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judge—is to establish the policy, and then, in effect, as a judge might instruct a jury, give some type of policy instructions.

Now, I haven't explored that, don't know enough about it. We hope to get them here and to go a little more into detail. Your concept would be that you would require or you would have the administrative law judge acting as a special master, and he would make findings of fact and also findings of the application of the law to the facts; and that this would be reviewed on certiorari by the agency that would be involved.

It's an interesting concept, but really not much different from the concept of certiorari.

Judge FAUVER. I think it requires an evolutionary process, Senator Heflin, that if we started with primary jurisdiction in the clear adjudicatory cases—of which there are tens and tens of thousands, where there would be no question that you're not dealing with making policy, straight-on adjudication—then we had a transition from that kind of case up to the case where the agency wants the opinion of the judge as to shaping policy.

If we started off using the judge there as a special master in policy cases, I think down the road would be a concept that if the agency asks the judge to enter findings of fact, they should be subject to review standards, whether it's a special master or not. That would be down the road, based on the experience of the system.

But on this panel, Judge Lozner, I think, has had a lot of cases where you do have an infusion of policy and factfinding. Perhaps he'd like to address some of those cases in his agency.

Judge LOZNER. I would prefer not to speak in terms of specific cases. But the fact is that when you are dealing with a regulatory body such as the Federal Communications Commission, the agency, the seven-man or six-man and a woman commission does make the policy, does establish the precedents. And that's the final adjudication within the agency. Administrative law judges are following those precedents whether you call them policy or law. However, there are gray areas that go into the policy area, and it's my understanding that Commission members are soliciting, in cases getting into policy areas, the views of the administrative law judge applicable to the particular facts in a litigated case, seeking a recommendation as to the direction of policy.

The final determination of what the policy will be, of course, remains with the Commission. But I remember numbers of cases in which the policy was not that defined. It changed over the years and was in the process of changing. Just as I left the Commission, I was involved in presiding over a case where there was an evolution of policy, as I viewed it, with the changing Commissions.

And it's essential, it seems to me, for the process that the agency look to the administrative law judge who has heard a vast amount of evidence and has viewed a historical development, shall I say, of policy, to recommend to the Commission a change in policy. And I think that by and large, our judges are meeting that challenge and making those recommendations, and are making a remarkable contribution toward the changes of policy.

Senator HEFLIN. Well, you raise some interesting questions. But you are dealing, then, in an ex parte manner, are you not, with your Commission?

Judge LOZNER. Not at all. I know of no situation where there have been ex parte communications from the Commission or staffs to judges in litigated cases. What I am saying, Senator, is that the area is not that black and white as to what is policy and what is an application of legal precedent. A specific situation perhaps will be illustrative.

When I was retired as of last Friday, I had completed the testimony and record in a case which we call a *UHF impact* case. In the 1950's the Federal Communications Commission was protective of UHF licensees against inroads from the established VHF licensees. This has changed, as I viewed it over the years. That no longer are UHF stations protected by the Commission, but that has been in a state of evolution.

And although I am not now writing the decision, it would seem to me that here the judge can make the contribution of making an evaluation of the state of the law, the state of the economic situation in the industry as of the present time, as it changed from the time when the policy was established in the 1950's.

That's the sort of thing, Senator, that I am talking about. Here, the judge can look at all of a vast amount of evidence—and here there was a great deal of economic evidence submitted—and look at it in terms of what has developed in this industry, and make a recommendation to the Commission in a particular case.

Senator HEFLIN. Well, aren't you ceasing, under that situation, ceasing to be a judge and becoming a counsel?

Judge LOZNER. No. I don't think so at all. Remember, Senator, that the judge is rendering a decision based upon a fully developed record in which adversary parties have made presentations. They have made their own evaluation of the state of the art, the development in the industry, what is the present situation with the industry as contrasted with what it was. So that in that kind of an evaluation I do not agree with you that the judge is making policy.

He is merely stating what his view is of a development that has occurred as has occurred in many regulatory areas where the judge, based upon this wealth of evidence that has been submitted, can submit his own views and recommendations to the policymakers.

Senator HEFLIN. Well, if you are coming out of a case and there are several parties in it, do you think the parties ought to have a right to question your advice to in effect present their disagreement or their agreement to the agency heads, if you attempt to give them advice on that?

Judge LOZNER. Not only do they have that opportunity, they exercise that opportunity in the extreme. Our judges' decisions are subject to exceptions, and the exceptions are then matters for consideration by the Commission itself. Generally, and in cases of this magnitude, oral arguments before the Commission are invited and are heard. At that time a full exploration of these different views can be presented to the Commission, and are.

Senator HEFLIN. Maybe you and I are not on the same wavelength.

What you are saying is that your recommendations as to policy determinations in a case are included in your opinion rather than through some oral conversation with a commission.

Judge LOZNER. Well, effectively—my own view of the process; the judge looks at that record and the evidentiary presentations, which are necessarily in the type of case I mentioned a matter of opinion evidence. And an evaluation is made by the judge, which hopefully is supported by the record, and must be. Then it's for the Commission to determine, as to whether or not the weight of the evidence that was presented, and upon which the judge based his decision, supports the decision.

Senator HEFLIN. In other words, your recommendations are included in your opinion, which is available to all parties as well as the heads of the agency in that form rather than an oral, private conversation with commissioners in regards to what your recommendations are?

Judge LOZNER. That's correct, Senator.

Senator HEFLIN. In this process of a fusion of policy with adjudication, did any of the agencies make some decision about policy before the adjudication, or is it all practically done after the adjudication?

Judge FAUVER. Judge Yoder is in the hearing room, and perhaps he would want to address you on that. Judge Yoder is with the CAB.

Judge YODER. Senator Heflin, I was not prepared to testify today, and I am not certain that I can shed much light on the question that you've asked.

The predetermination of policy by an agency with respect to any adjudicatory process can occur in the forum of rules established by the agency; general statements of policy established by the agency; under ground rules for the hearing itself which are issued in the initiating order, which creates—which starts the proceeding.

With respect to the CAB, as you know, a great deal of change has been taking place there, and in the course of the change taking place there, there have been a great many policy changes. And those policy changes are enunciated in the ways that I have just indicated—which does not remove the problem that is presented to the judge, it seems to me, in every case that he presides over, of determining what the facts and legal issues are in the case and determining what the agency policy is, no matter how clearly it appears to be stated.

The judge still has to decide what that policy is. And in a given case, on the basis of a specific record, he has to decide whether—how that policy should be applied, and indeed, whether a recommendation should be made that the policy should be changed. And I don't know of any way to avoid that in any given case.

I don't know that that's particular helpful in responding to your question. I know there's been some discussion previously about the CAB having some peculiar initiative in this regard. The judge has to make those decisions as to what policy is, as to what the record is, as to how the policy should be applied to the record, and as to whether the record before the judge, in fact, suggests that the policy should be applied in a different way, or that the policy should be changed.

All those things would appear in the judge's findings in the proceeding, obviously, not in ex parte communications to the agency.

Senator HEFLIN. It always leaves a sense of great frustration among parties if they followed a course of action and then the case is overruled due to policy reasons. In order to avoid that as much as possible, if there is going to be a change in policy, perhaps the change ought to be communicated prior to the adjudication. Again, I can understand why factual situations present matters that affect the law. You know, the old statement, "A bad law arises out of bad facts." I don't know, maybe this is not a serious concern.

You basically have law-trained people, and people who have developed a good deal of expertise in the case. Then a decision may be made by heads of the agency who may not have any law training whatsoever; or any real expertise.

I am exploring the possibilities of how you could handle this, in the best manner. The idea, of course, is you make your determination and those determinations may later be reversed. But it does give a little more independence to the judge.

Judge FAUVER. I think the concept of using judges in rare cases as special masters may be a necessary accommodation to the agency's objections to the unified corps down the road. I don't recommend that we just set up a category, "special masters," but I think down the road that may be a workable accommodation in true policy cases. I think Judge O'Brien had some views on policy cases.

Judge O'BRIEN. There are two schools of thought on whether or not an administrative law judge ought to follow blindly in the path of Commission policy or whether he ought to look at the Constitution. In the past 2 years, for instance, at the ICC, there has been a complete change of policy with respect to motor carrier authorities. They have decided to open the door to permit any who wishes to apply to give them authority to operate all over the country if need be.

Now, there has been opposition to that. People who have paid substantial amounts of money for their authority and have proven themselves; and the motor carrier original act pointed out the frailties that existed prior to the Motor Carrier Act, where nonresponsible operators were on the highways without any insurance. And these were some of the things that the Motor Carrier Act sought to cure.

But, as I say, for example, in these two editorials that were in the Traffic World attached to my biography, they were brought about because of the fact that I refused to go along with Commission policy. Instead, I applied the law as I saw it. The Commission has decided, for example, that competition is the overriding factor today. Well, that goes absolutely contrary to what the Supreme Court has said in the past. But nevertheless, some of the judges have attempted to interpret the law and have refused authority, and just ipso facto the Commission reverses them without any explanation at all except to say, "This is our policy today."

Now, as I say, I do not believe that the administrative law judge has to, when there is a distinction between policy and law, I don't think he has to blindly follow the policy. But you put your finger on it, too. There is but one lawyer on the ICC and he was just

appointed. Most of them claim to be economists, and they feel as though this is going to be the cure-all. In other words, competition in the marketplace will be the decisive factor. And those that can serve, fine, they will continue to serve. Those that can't, competition is too tough for them, well, that's just too bad.

As I say, that's the policy. And gradually the same thing is going to happen with the motor carrier, people that use motor carrier service; they are going to find the same thing is true, that has happened with the airlines. All of a sudden the service goes down over here and comes up here. Prices go down over here and comes up over here.

So, as I say, it will eventually come back to the point where they are going to look for another—for further regulation. When that will come I can't say.

Senator HEFLIN. I agree with you on that. I think, with respect to the question of universal services after airline deregulation, the communities are suffering today.

Let me ask some other questions about this.

What's your opinion, on the present review by the court system of administrative decisions in which administrative law judges participate should scope of review be changed and, if so, what would be the scope of the review?

Judge FAUVER. In the agencies that I have worked for, the appellate review is based on a substantial-evidence rule. I have encountered no problems and have no specific recommendations on judicial review, based on my own experience.

Judge FOWLER. Senator Heflin, at the National Transportation Safety Board, we had been very well satisfied with our scope of review there. The courts that have that—I mean the cases that have been certified from the Board to the circuit court, the Board's decisions had been upheld almost unanimously, batting practically 1,000 percent.

Senator HEFLIN. That may be the fault.

Judge FOWLER. And most of those cases, of course, the Board has affirmed the judge in his findings. I would say that in our agency, as I mentioned earlier, the judge's decision is final. It seemed to be a final decision in lieu of an appeal, although the Board does have the authority technically to review any decision if it so sees fit. But, of course, that is invoked very, very seldom.

I have noticed myself personally when the courts review our cases, that they seem to have advanced, they seem to have a greater appreciation for the work of the Board and for the ALJ that has rendered the decision, and they are reluctant to disturb that decision if it's based on substantial evidence.

Senator HEFLIN. There are some people who feel that you ought to have a right of an appeal and review. This concept in some agencies would be to the effect that you would have an administrative law judge decision, with appeal to a panel. In this fair housing bill that you mentioned, the concept is there. And then, of course, in the fair housing bill, that review is final. The Secretary of HUD would not have the authority to modify or change the opinion whatsoever.

How do you see a review panel—how it ought to be constituted, whether it has advantages or disadvantages.

Judge FAUVER. First, I think the review panel, you have two models of review panels. You have a judicial model and a policy-making model. I think in the field of administrative law, the model should be a judicial model, because they are reviewing the decisions of administrative law judges. Now, as a judicial model, I think the review panel should be subject to certiorari review. In no case can I see a justification in administrative law for an automatic right of appeal.

I think that one of the big problems of the Federal Government, as GAO studies and many studies on regulatory lag have shown, is the overlayering of review and excessive de novo review. If you establish a review of lawyers to review things automatically, they're going to find issues to review. Suddenly, they'll need GS-15's, they'll need supervisors, and it's the Parkinsonian push.

So I would say it should be a judicial model. It should be subject to review standards, and because you're dealing with a decision of an administrative law judge, I think that the panel should be confined to commission—that is agency members and administrative law judges. I think there are a lot of good reasons for that position. I have included those in rather extensive testimony before other committees, which I have cited in my statement, Senator Heflin.

Senator HEFLIN. That's a little bit contrary to the basic concept of most judicial systems, other than perhaps Virginia. I mean give a right of appeal as opposed to certiorari from a trial judge to an appellate court. I don't mean as finding of facts, cloaked with presumptions of correctness, but——

Judge FAUVER. This is what the GAO was considering. In 1978, the GAO studied the process particularly from the standpoint of delay and inefficiency in internal review and did recommend breaking away from the custom of automatic appeal. They recommended certiorari review across the board as an amendment.

Where this really got started was in the Senate Labor Committee. There are about three statutes today that have what I would call "true" certiorari review, with review standards, in all of the Federal statutes. There are only about three of them. But I think it's the future. I think that GAO recognized that in administrative law.

Senator HEFLIN. Well, I am not sure what motivates the GAO, whether it's a concept of due process or whether it's a concept of efficiency.

Judge FAUVER. I think their idea was that there should be a presumption of fairness in an administrative proceeding, because, after all, the judge is completely insulated. There is an expertise contemplated for the position and that a party should have the burden of pointing to an important reason for the agency to consider a review rather than just make it automatic.

Senator HEFLIN. I appreciate your testimony and statements. I think it has been a very informative and enlightening discussion this morning.

We will excuse you right now and go ahead with the next panel, which is the Honorable Ernst Liebman, past chairman of the Conference of Administrative Law Judges, and Richard B. Smith,

chairman of the Coordinating Group on Regulatory Reform of the American Bar Association.

STATEMENT OF HON. ERNST LIEBMAN, PAST CHAIRMAN, CONFERENCE OF ADMINISTRATIVE LAW JUDGES; ACCOMPANIED BY CRAIG BAAB, AMERICAN BAR ASSOCIATION

Judge LIEBMAN. Mr. Chairman and members of the committee, my name is Ernst Liebman. I am the past chairman of the Conference of Administrative Law Judges of the American Bar Association. I am testifying this morning on behalf of the American Bar Association.

Senator HEFLIN. You are a private practitioner?

Judge LIEBMAN. I am an administrative law judge at the Federal Energy Regulatory Commission. I have been there for the past 6½ years in that capacity.

To my right is Mr. Craig Baab, of the staff of the American Bar Association's Governmental Relations office. Mr. Smith could not be here this morning, so I will be presenting the American Bar Association's position.

With your permission, Mr. Chairman, I would like to have copied into the record my prepared written statement, and then I will make a much shorter oral presentation.

Senator HEFLIN. It will be so.

Judge LIEBMAN. Thank you.

The American Bar Association appreciates this opportunity to comment upon the Federal administrative law judge system in connection with pending regulatory reform proposals. We have worked with members and staffs of the Senate Judiciary and Governmental Affairs Committees, the House Judiciary and Post Office and Civil Service Committees and four subcommittees of those committees.

Hearings before those committees have produced three committee prints of bills involving administrative law judges: S. 262, S. 2147, and H.R. 6768. None of these bills reflects the provisions deemed necessary and essential by the American Bar Association to protect the independence of administrative law judges and the integrity of the administrative process.

In particular, we are opposed to proposals for limited terms for administrative law judges and proposals for evaluations of administrative law judges without peer review and adequate due process protection, although we do support the establishment of sound evaluation procedures as outlined below. We are also concerned with proposals which reinforce selective certification, a process which detracts from the independence of judges. None of the bills addresses the serious problem of adequate compensation and recruitment of administrative law judges who are appropriately excluded from merit pay provisions and the Senior Executive Service.

Some, but not all, of these bills would abolish the veteran's preference, an anachronism in judicial selection which tends to lower the quality and strength of the ALJ corps.

Proposals for pay bonus awards to judges, found in S. 755, are opposed by the American Bar Association, have found virtually no support in the Congress, and are not included in any of the other bills I have mentioned.

On June 2, 1979, the American Bar Association's Board of Governors adopted a resolution opposing limited terms and bonus pay awards for administrative law judges, and supporting a system of periodic performance evaluations of administrative law judges by peer review boards insulated from agency pressures and assuring the judge due process protections.

The key ingredients in any such evaluation system are these:

First, the standards of performance for administrative law judges should be developed and approved by a review board and not solely by an administrator.

Second, the review board should be composed of a majority of administrative law judges, excluding chief administrative law judges.

Third, before a complaint is brought by the administrator before the Merit System Protection Board, the judge should be given written notice of the basis of the complaint and an opportunity to appear before the review board.

Fourth, a complaint against a judge should be brought before the Merit Systems Protection Board only if a majority of the review board votes to file the complaint.

Fifth, the judge should be entitled to a hearing on the record before the Merit Systems Protection Board, which would make an independent determination whether the judge's performance was unacceptable; and the judge should be entitled to judicial review.

Sixth, proceedings and findings of the review board should be confidential unless a finding of unacceptable performance leads to a proceeding before the Merit Systems Protection Board.

None of these ingredients is contained in S. 262 and H.R. 6768. In both bills, the judges have been removed from a meaningful role in establishing standards for performance or administering these standards. Under both bills, decisions concerning sanctions for unacceptable performance can be made by persons who are not administrative law judges and without an oral evidentiary hearing being given to the accused judge.

Both bills permit the imposition of sanctions prior to the completion of appeals to the Merit Systems Protection Board, where a hearing before an administrative law judge is barred. Moreover, S. 262 would bar any appeal from a decision concerning reappointment. S. 262 also alters the present "good cause" standard found under section 7521 of title V of the United States Code, to permit sanctions based upon the "efficiency of the service." We respectfully submit that there is no basis for such an assault upon the administrative law system.

While the ABA favors a system of periodic performance evaluations of administrative law judges subject to the foregoing protections, the American Bar Association is aware that the evaluation of sitting judges raises serious and fundamental questions which should be answered:

What do we mean by "evaluation"? What are the appropriate subjects for evaluation? For example, can decisional correctness, decisional quality, and judicial demeanor all be evaluated absent a specific complaint? What are appropriate standards for evaluation? May case load quotas appropriately be imposed?

Can uniform standards be developed in the face of the multiplicity of agencies, types of cases, and numbers of laws with respect to the judges' function? Can evaluation be established so as to ensure against agency and pressure-group influence in the evaluation process and the chilling effect of such influence on the fact and the public perception of judicial impartiality?

Can an evaluation system be devised that is reliable and valid so that the system tests what it purports to test and so the results can be duplicated by another group of evaluators applying the same criteria and standards?

We welcome the interest of this committee in the relationship of the administrative law judges to the agencies for which they hold hearings and the need for judicial independence and other protections that a judicial system provides. The ABA's resolution refers repeatedly to the need to assure that independence.

We note that the Administrative Procedure Act contains a number of procedures designed to guarantee the independence of administrative law judges. They may not perform duties inconsistent with their duties as administrative law judges. When conducting a hearing under the Administrative Procedure Act, the administrative law judge is not responsible to or subject to the supervision or direction of employees or agents engaged in the performance of investigative or prosecution functions for the agency, nor may an administrative law judge consult any person or party, including other agency officials, concerning a fact at issue in the hearing unless on notice and opportunity for all parties to participate. Administrative law judges must be assigned to cases in rotation so far as is practicable. They may be removed only for good cause established and determined by the Merit Systems Protection Board after a hearing on the record. Their pay is controlled by the Office of Personnel Management, not by the agencies where they work.

Although the Administrative Procedure Act attempted to guarantee the independence of administrative law judges, history shows that agencies at times have interfered with that independence. In our written prepared testimony, we gave a number of examples of such interference. We assume that this committee is aware of the Hoover Commission studies in 1955, which considered the possibility of a separate administrative court to handle all adjudicative responsibilities of federal agencies, and we assume that the committee does not want to reopen the debate on that question.

On the other hand, this committee might consider procedures for assuring administrative independence of judges within agencies where they serve and the possibility of administrative independence of those judges from the agencies where they serve.

The ABA has considered the possibility of an Administrative law judge corps administrated separately from the agencies where the judges serve. But the American Bar Association has not taken a position on this proposal.

In closing, the American Bar Association believes that the administrative law judge system is basically sound, although the ABA recognizes that some problems do exist and that improvements in the present system can be made. The present system has functioned well for more than 30 years to assure a fair hearing for

private litigants before public agencies. Any proposals for change should reflect a careful study of history, a thorough understanding of the present functioning of the system, and an appreciation of the necessarily unique nature of the ALJ position in government. That position cannot be forced into a purely executive mold, such as the Senior Executive Service, or a purely judicial mold without consideration of the needs of the agencies.

We will be happy to cooperate with the committee in identifying problem areas and providing recommended solutions.

I would be happy to respond to any questions.

Senator HEFLIN. Good.

Well, I gather you, of course, are speaking for the American Bar Association on the concept of a unified corps of administrative law judges. What—would you care to express your own personal opinion?

Judge LIEBMAN. I would be happy to give you my personal opinion about the corps concept. The problem I have is I can't foresee what form the corps will take. There are obvious benefits to the corps concept, and they have been mentioned to you. You do get away from the appearance of bias, of having the judge within the agency. You certainly get more flexibility in using your judges, because you can move them from one agency to another without any constraints of having a chief judge wanting to keep his judges in reserve for the next case. You may have some savings in money.

On the other hand, I think you have to approach the problem very cautiously. There are 30 agencies employing administrative law judges, and maybe 10 more who hire them on occasion. The judges do vastly different things, and so the structure of the corps becomes an important issue.

The corps will not work well unless you have very high quality administrative law judges. If you want the fungibility which goes with the corps, you've got to have fungible people, and that means good people.

And I daresay, under the present salary schedules, despite Senator Ford's concerns, you are not now attracting the kinds of people you need for very difficult cases.

Senator HEFLIN. Why do you make that premise, that under a corps it wouldn't work, but it does work under an agency?

Judge LIEBMAN. Oh, I don't mean to say it does work perfectly now under the agences. I think there are problems right now. But if you are going to have the corps—well, I think—let me backtrack a little bit. I think within an agency you build up expertise in the judges, and that makes up for a lot.

But I think if you are going to have a corps, where you want to shift generalists around, you are going to have to have high-caliber lawyers, and you've got to attract them to the administrative judiciary. Otherwise, I think you're going to have difficulty. That's my own perception. And what you do to attract them, I don't know.

Senator HEFLIN. But if a person has got an IQ of 115 and he is acting as a judge, even with expertise, it's a shallow expertise. If he's got an IQ of 140, it's a superior expertise.

Of course, I admit that the concept of the fact that you have some expertise and the person, maybe, who was a slow learner, after awhile the experience does give him those expertise. But I

don't know whether they are altogether— those problems of expertise and experience outweigh the other advantages. I think you have to consider that.

Judge LIEBMAN. I have seen judges shifted from agencies to agencies on occasion, being borrowed. The ones that make the shift most easily are your best judges. They are bright; they have gone to good law schools; they have a lot of experience. And I think, as you go down the scale, you have more difficulty in shifting judges around. That's really all I'm saying.

There is another problem I think you have to face, and that is you have to ensure against the corps being under a single administrator who becomes a czar over all the judges. That problem does not exist now, with the judges split up among 30 agencies.

If some of these administrative reform bills with respect to the administrative law judges go through, where you have the hiring and the firing and the retention and the judges terms all under the control of one man, I can easily see a problem that we complained about in our Declaration of Independence, where King George was accused of controlling the judges——

Senator HEFLIN. Let's explore that. Take, for example—let's say the NLRB labor and management, where you've got staggered terms of Commissioners and various concepts. A President comes in; he is antilabor or antimanagement, whatever you want to say. If he has some control over the corps administrator, that corps administrator, in assigning judges, unless you developed a strictly fair system, could influence decisions made by that board. I see an inherent danger of that. And you would have to structure it in such a manner as to prevent it.

On the other hand, the administrative agencies perform basically an executive function. There is a informal process in the executive branch for the policies of the President to be carried out. But how do you fit this all in together to have an independent judging and yet policymaking—it's got some problems, there's no question about it.

Judge LIEBMAN. I'm not taking a position. I just see these as possible problems.

Senator HEFLIN. I'm not sold one way or the other. I just want to explore it. It's not as simple as it might seem.

Judge LIEBMAN. I would say this, I certainly would support a study of the corps concept. A study has not been done. There's been a little bit written on it. I think Attorney General Robert Bork's report was mentioned to you earlier, and I've seen some other writings. But I think you really have to do an in-depth study of the problems.

Mr. BAAB. Senator, if I may add one point; although the association has not taken a position one way or the other on a corps, our commitment, as Judge Liebman mentioned, to the establishment of sound broad-based performance evaluation procedures, would deal with some of the problems that the two of you were just discussing.

A corps may or may not resolve problems of independence and may or may not help to continue increasing the quality of the ALJ's. But if a performance evaluation system is established which has the confidence of both the ALJ's and the public appearing before administrative agencies and in which the ALJ's have par-

ticipated in establishing the standards by which they will be evaluated, and if these standards are applied by an independent board, we think that would go far toward helping to resolve any possible problems of independence that we have had.

Senator HEFLIN. Well, evaluations, even a complaint concept, disciplinary commissions which State court systems have had—they basically deal with nondecisionmaking functions. You clearly try to distinguish the decisionmaking function to give it independence.

Basically, the concept of judicial commissions or inquiry commissions, deal with really nondecisionmaking functions.

The adminstrative law system is not structured to the extent of the judicial system, concerning the independence of judges. You want to have complete independence, and you want to have the appearance of independence. You do not want to start reviewing in any evaluation or commission or anything else whether the judge was biased or not biased in the decisionmaking process. Somehow or another, you have to do that differently, it seems to me.

Mr. BAAB. Our commitment to the independence of ALJs is probably best exemplified by the statement that performance evaluation ought not to be a substitute for appeal. As you point out, these are two entirely separate issues.

Senator HEFLIN. Well, we appreciate it. And we would like, you to provide us with any views you may have on the concept of the independent corps.

Well, thank you. We appreciate your being here and you testimony.

[The statement follows:]

STATEMENT OF JUDGE ERNST LIBEMAN, PAST CHAIRMAN, CONFERENCE OF ADMINISTRATIVE LAW JUDGES, JUDICIAL ADMINISTRATION DIVISION, AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee, the American Bar Association appreciates this opportunity to comment upon the federal administrative law judge system.

The extensive work of numerous commissions, sections and committees of the ABA has resulted in a package of recommendations on the broad need to improve various aspects of the federal administrative process. Thus, our support for refinements in the system of evaluating ALJ performance, and our opposition to such ill-conceived notions as set terms for ALJs, are but parts of a comprehensive, balanced proposal for regulatory reform.

In connection with pending regulatory reform proposals we have worked with members and staffs of the Senate Judiciary and Governmental Affairs Committees, and four subcommittes of those committees. Hearings before those committees have produced three committee prints of bills involving administrative law judges (S. 262, S. 2147, H.R. 6768). None of these bills reflect all the provisions deemed essential by the ABA to protect the decisional independence of administrative law judges, to assure the institution of effective performance evaluation, and to guard the integrity of the administrative process.[1]

In particular, we are concerned about proposals for limited terms (S. 262) and evaluations of adminstrative law judges without peer review or adequate due process protections (S. 262 and H.R. 6768). We are also concerned that S. 2147 reinforces selective certification (a process which detracts from the independence of judges) and that none of the bills address the serious problem of adequate compensation and recruitment of judges, who are appropriately exclude from merit pay provisions and the senior executive service.[2] Some, but not all, of these bills would abolish

[1] The Association is pleased to note that H.R. 6768 has omitted limited terms and ALJ merit pay provisions.

[2] Proposals for pay bonus awards to judges in the Administration bill (S. 755) are opposed by the ABA, have found virtually no support in the Congress and are not included in any of the other referenced bills.

veterans preference—an anachronism in judicial selection which tends to mediocratize the quality, strength and independence of the ALJ corps.

On June 2, 1979, the ABA Board of Governors adopted a Resolution [3] opposing limited terms and merit pay for ALJs and supporting a system of periodic performance evaluations of ALJs by peer pannels insulated from agency pressure and assuring the judge due process protections. There are six key ingredients of any such evaluation system:

(1) The standards of performance for Administrative Law Judges should be developed and approved by a review board and not solely by and Administrator.

(2) The review board should be composed of a majority of ALJs (excluding Chief ALJs).

(3) Before a complaint is brought by the administrator before the Merit System Protection Board (MSPB), the judge should be given written notice of the basis of the complaint and opportunity to appear before the review board.

(4) A complaint against a judge should be brought before the Merit Systems Protection Board only if a majority of the review board votes to file the complaint.

(5) The judges should be entitled to a hearing on the record before the Merit Systems Protection Board which would make an independent determination as to whether the judge's performance was unacceptable; and the judge should be entitled to seek judicial review of this determination.

(6) Proceedings and findings of the review board should be confidential unless the Board makes a finding of unacceptable performance. Thereafter, any proceedings before the Merit Systems Protection Board should be public to assure due process to judge.

None of these ingredients are contained in the pending bills (S. 262 and H.R. 6768).[4]

S. 262 AND H.R. 6768

We have previously testified extensively concerning S. 262, H.R. 6768 and related bills.[5] S. 262 would establish limited terms for administrative law judges and seriously undermine their independence. Both bills establish evaluation procedures without a balanced review panel membership and due process protections. Neither of those bills require that a review panel approve any evaluation standards developed.

REVIEW BOARD

Neither S. 262 nor H.R. 6768 would provide peer review. S. 262 provides that the Administrator of the Administrative Conference of the United States (ACUS) could establish performance standards unilaterally, after "consultation" with one or more review boards, not more than half of which would be administrative law judges, including chief judges. H.R. 6768 would create a three member Performance Review Board, including the Chairman of ACUS, appointed by the President, with one member a former administrative law judge.

DUE PROCESS

Under S. 262, during the tenth year of a judge's term a performance review board would recommend whether a judge is affirmatively qualified to be reappointed. If the Administrator of ACUS agrees with the recommendation of the board that a judge is not affirmatively qualified, that determination "is final and may not be appealed to the Merit System Protection Board or any court of the United States." [6] If the Administrator determines that a judge is not qualified to be reappointed despite a contrary finding by the board, the judge may appeal that decision to MSPB but the judge would not be reappointed during pendency of the appeal. The

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[3] That resolution is attached as appendix A and also is reprinted in Regulatory Reform Legislation: Hearings on S. 262, S. 755, S. 445, S. 93 Before the Senate Committee on Governmental Affairs, 96th, congress, 1st Session, pt. 2, 334-37 (Statement of the American Bar Association).

[4] S. 2147 contains only limited provisions concerning administrative law judges. That bill would: (1) Abolish veterans preference—favored by ABA; (2) Establish a "rule of 10" instead of the present "rule of 3" in referring eligible candidates to agencies for selection to ALJ positions favored by the ABA; (3) Recognize the propriety of selective certification—opposed by the ABA; (4) Shift selection of ALJ's to the Administrative Conference of the United States—no ABA position.

[5] Selection and oversight of Administrative Law Judges: Hearings on H.R. 6768 before the House Comm. on Post Office and Civil Service, 96th Cong., 2d Sess. 60 (Statement of Judge Ernst Liebman); Regulatory Reform Legislation: Hearing on S. 262, S. 755, S. 445, S. 93 before the Senate Comm. on Governmental Affairs, 96th Cong., 1st Sess. Pt. 1, 333; Pt. 2, 686 (Testimony of Judge Ernst Liebman).

[6] S. 262, Committee Print, dated April 15, 1980, section 4324(d)(1), p. 132.

standard for review by MSPB would be whether the determination by the Administrator was "reasonable," not whether the judge was in fact unqualified. Moreover, contrary to the present procedure where complaints against judges are tested in an oral evidentiary hearing before an administrative law judge, no oral evidentiary hearing would be provided before the Administrator's decision and S. 262 specifically provides that on appeal to MSPB the case must be heard by the Board rather than an ALJ.

Similarly, under S. 262 the Administrator is empowered to determine in his sole discretion (albeit "on the basis of an evaluation by a review board") whether a judge should be reduced in grade or removed (no other sanctions are specified) for "unacceptable performance." Although the judge is given 30 days notice of the proposed action and may "answer orally and in writing," no evidentiary hearing is provided, and the Administrator's decision is nevertheless effective, pending any appeal to MSPB under section 7701.

H.R. 6768 also fails to provide peer review or due process for judges in connection with mandatory performance evaluations. Under H.R. 6768 the Performance Review Board establishes the performance appraisal system and the performance standards, and it evaluates each judge's performance at least once each six years. The Board must provide for participation by ALJs in establishing performance standards and objective criteria to be used in evaluating performance, but the final decision with respect to such standards and criteria would be that of the Review Board. Evaluations conducted by the Board could result in reassignment, reduction in grade or pay, suspension or removal. Procedures before the Board would be similar to those for evaluations under S. 262. Although objections to the Board's proposed decision could be made orally and in writing, there would be no oral evidentiary hearing before the Board. The Board's decision could be appealed to MSPB under 5 U.S.C. 7701, but the Board's decision would take effect before the judge had an evidentiary hearing on the record before MSPB. The hearing before MSPB would be en banc without a hearing before an ALJ or a panel of ALJs.

Thus in both bills (S. 262 and H.R. 6768) the judges have been removed from a determinative role in establishing standards for performance or administering those standards. Under both bills decisions concerning sanctions for unacceptable performance can be made by non-peers without an oral evidentiary hearing. Both bills permit the imposition of sanctions prior to the completion of appeals to MSPB, where a hearing before an administrative law judge is barred. Moreover, S. 262 would bar any appeal from a decision concerning reappointment. S. 262 also alters the present "good cause standard," 5 U.S.C. 7521, to permit sanctions based upon the "efficiency of the service." S. 262, Committee Print dated April 15, 1980, p. 137.

We respectfully submit that there is no basis for such an assault upon the administrative law judge system.[7] Proposals for terms of years and placing the power to hire, fire, and discipline ALJs in the hands of a single czar would erode the independence of ALJs and the integrity of the hearing process. The federal administrative law judge system has served this country well, because the Congress had the foresight to assure the independence and integrity of those judges by requiring a showing of good cause for their removal. Nothing has shown that good cause is not an appropriate and workable standard. While there have been few proceedings initiated against judges in the first thirty years of the Administrative Procedure Act, the lack of complaints may result from (1) a dearth of problems and (2) the fact that only an agency can initiate a complaint. Accordingly, to improve the present system we have recommended that the effectiveness of the complaint process and the independence of the judges could be enhanced if complaints could be filed with a peer group by any aggrieved person.[8]

We welcome the interest of this committee in the relationship of administrative law judges to the agencies for which they hold hearings and the need for "judicial independence and other protections that a judicial system provides." The ABA's resolution refers repeatedly to the need to assure that independence. The Administrative Procedure Act contains a number of provisions designed to guarantee the independence of administrative law judges.[9] They may not perform duties inconsist-

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[7] H.R. 6768 apparently contemplates additional expenditures of nearly $1 million by ACUS and the hiring of fourteen investigators with the primary responsibility to "evaluate" judges. Report, 21. The implications of such a structure and such resources for the independence of administrative law judges are ominous.

[8] Selection and Oversight of Administrative Law Judges: Hearings on H.R. 6768 Before the House Comm. on Post Office and Civil Service, 96th Cong., 2d Sess. 66, 67 (Statement of Judge William Fauver). Regulatory Reform Legislation: Hearings on S. 262, S. 755, S. 445, 543 before the Senate Committee on Governmental Affairs, 96th Cong., 1st Sess., Pt. 1, 686, 699, (Testimony of Judge Ernst Liebman). See also testimony of Judge William Fauver, Id. Pt. 1, 840, 841.

[9] See *Butz* v. *Economou*, 438 U.S. 478, 511-13 (1978).

ent with their duties as administrative law judges. When conducting a hearing under section 5 of the APA, an administrative law judge is not responsible to or subject to the supervision or direction of employees or agents engaged in the performance of investigative or prosecution functions for the agency. Nor may an administrative law judge consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. Administrative law judges must be assigned to cases in rotation so far as is practicable. They may be removed only for good cause established and determined by the Merit System Protection Board after a hearing on the record. Their pay is also controlled by the Office of Personnel Management.

Although the Administrative Procedure Act attempted to guarantee the independence of administrative law judges, history shows that agencies have interfered with that independence.

In the late 1940s there were attempts to fire about half of the hearing examiners at the National Labor Relations Board because their decisions did not demonstrate the "Correct" political philosophy. That fiasco is documented in several law review articles. See e.g., Fuchs, "The Hearing Examiner Fiasco Under the Administrative Procedure Act," 63 Harvard Law Review 737, 753, et seq. (1950); Morgan, "The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process," 59 Yale Law Journal 430 (1950); Macy, "The APA and the Hearing Examiner: Products of a Viable Political Society," 27 Federal Bar Journal 352, 364-369 (1967). That experience led to the current system of merit selection and career appointment for administrative law judges.

Another example of agency interference with decisional independence may be given from past experience at the Civil Aeronautics Board. The job description of the Chief Judge of the CAB provides that although he does not in any way dictate the substance of such documents, he must seek to insure uniformity" in judges' decisions. Prior to the appointment of Chief Judge Nahum Litt in 1977, that provision was implemented by mandatory review by his predecessors of all judges' decisions, including procedural orders, before they were permitted to issue. That review frequently resulted in strong "suggestions" of substantive change. Such "suggestions" by the Chief Judge, unsolicited by the presiding judge, delayed the decisional process and were inimical to decisional independence.

Another case comes to mind involving Administrative Law Judge Joseph J. Kennedy, who was reprimanded by the Under Secretary of the Department of Interior for issuing a decision in a case assigned to him. The Attorney General of the United States ruled that the judge could not be so reprimanded. Attorney General's Opinion, dated January 18, 1977.

Judge Howard I. Grossman, testifying on behalf of the Association of Administrative Law Judges in the United States Department of Health, Education and Welfare, before the Senate Committee on Governmental Affairs, gave details on how the decisional independence of HEW judges was infringed when the judges were threatened by the agency with "corrective action" if they granted too many claims.[10]

A number of lawsuits were instituted by the HEW judges against the agency because of various actions interfering with their decisional independence. One such lawsuit resulted in an opinion by the United States Court of Appeals for the Second Circuit in *Nash* v. *Califano*, Docket No. 79-6180 (decided January 7, 1980). The decision held that an administrative law judge has standing to sue to protect his decisional independence. The decision sets out in some detail the agency practices complained of by the judge.

Another example of interference with decisional independence can be found in the caseload quotas imposed on administrative law judges by some agencies such as the National Labor Relations Board and the Social Security Administration. These caseload quotas require that judges decide a given number of cases in a given period of time. Such quotas assume that judicial decisions are like sausages to be turned out in assembly-line fashion. What litigant wants a judge to decide a case before the judge has thoroughly digested the record and is comfortable with his decision? Caseload quotas raise serious due process questions and threaten the fairness of the hearing process.

We assume that the Committee is aware of the Hoover Commission studies in 1955 which considered the possibility of a separate administrative court to handle

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[10] "Regulatory Reform Legislation," Hearing before the Committee on Governmental Affairs, United States Senate, Ninety-Sixth Congress, First Session on S. 262, S. 755, S. 447, S. 93 and other Regulatory Reform Legislation, March 20, April 6 and 24, May 3, 4, 16 and 18, 1979, Part I, pp. 732-809.

all adjudicative responsibilities of Federal agencies,[11] and we assume that the committee does not intend to reopen the debate on that question.[12] On the other hand, the committee might consider procedures for assuring administrative independence of judges within agencies where they serve, and the possibility of administrative independence of those judges from the agencies where they serve. The ABA has considered the possibility of an administrative law judge corps administered separately from the agencies where they serve but has not taken a position on those proposals.

In closing the ABA believes that the administrative law judge system is basically sound. It has functioned well for more than thirty years to assure a fair hearing for private litigants before public agencies. Any proposals for change should reflect a careful study of history, a thorough understanding of the present functioning of the system, and an appreciation of the necessarily unique nature of the ALJ position in government. That position cannot be forced into a purely executive mold (the senior executive service) or a purely judicial mold (without consideration of the needs of the agencies). Any legislation should reflect the insights of the judges themselves and should be geared toward a positive reinforcement of the quality, independence and integrity of administrative law judges through administrative independence, separate and adequate pay scales, and procedures for oversight of agency encroachment upon ALJ independence. We will be happy to cooperate with the committee in identifying problem areas and providing recommended solutions.

APPENDIX

On June 2, 1979, the Board of Governors of the American Bar Association adopted the following resolution:

Be it resolved that:

I.

The Association urges that, if the Congress enacts legislative proposals (such as those contained in S. 262, S. 755, and H.R. 3263 or similar legislation) requiring Federal agencies to implement planning and management procedures designed to reduce regulatory delay—such as to develop agendas, to fix deadlines for completion of significant agency action, to publish uniform statistical reports, and to establish internal planning offices—Congress should provide additional resources to the agencies to perform these functions. If it does not do so, the imposition of possibly burdensome management procedures is bound to create further delay, and thereby frustrate the purposes sought to be achieved through such proposals.

II.

The Association supports efforts to improve reasoned decision-making by ensuring that the consequences of major regulatory actions are thoroughly considered from the perspective of the regulatory agency's responsibilities as well as overall national policy. Accordingly, the Association supports procedures under which agencies are induced to consider the costs as well as the benefits of proposed regulatory actions. However, the Association opposes enactment at this time of legislation which would require regulatory agencies to engage in regulatory analysis of proposed actions. Rather, the Association supports careful review of executive agencies' experience with regulatory analysis under Executive Order 12044, before such requirements are embodied in statutory prescriptions.

III.

The Association supports experimentation with a procedure by which overall national policy would be considered in a rulemaking proceeding through inter-agency review of proposed major rules, and recommends that Executive Order 12044 be extended to provide for such inter-agency review.

IV.

The Association supports legislative proposals (such as those contained in S. 262, S. 755, and H.R. 3263 or similar legislation) to amend the Administrative Procedure Act:

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[11] Commission on Organization of the Executive Branch of Government, "Task Force Report on Legal Services and Procedure," 246 (1955).

[12] Compare, e.g., Minow, "Suggestions for Improvement of the Administrative Process," 15 Ad. L. Rev. 146, 146-147 (1963) and Hector, "Problems of the CAB and the Independent Regulatory Commissions," 69 Yale L.J. 931, 932 (1960) with Kintner, "The Current Ordeal of the Administrative Process: In Reply to Mr. Hector," 69 Yale L.J. 965, 971 (1960).

(A) to authorize agencies, in proceedings required to be decided on the record after opportunity for an agency hearing, to designate one or more experts, such experts to be appointed in conformity with, and subject to the provisions of, Rule 706 of the Federal Rules of Evidence.

(B) to grant, in accordance with previous ABA positions, subpoena power to administrative agencies in connection with formal proceedings. However, the Association opposes proposals which would withdraw jurisdiction from the courts to entertain pre-enforcement challenges to the validity of such subpoenas or that would preclude challenges to third-party subpoenas by the real party in interest.

V.

The Association supports legislative action which would, with respect to the appointment and tenure of administrative law judges (ALJs):

(A) Create a system of periodic performance evaluations by an Administrator outside the employing agency, under standards of performance to be promulgated by the Administrator with the approval of a review board composed of a majority of ALJs (excluding Chief ALJs) but no individuals from the agency that employs the ALJ under review or who regularly litigate before that agency. Such evaluations may lead to the filing of a complaint by the Administrator before the Merit Systems Protection Board (MSPB) seeking removal or other sanctions of ALJs whose performance is found unacceptable by MSPB after a hearing on the record; *provided* that before any such complaint is filed (1) the accused judge is given written notice of the basis of the complaint and an opportunity to appear before the review board and (2) a majority of the review board has voted to file such complaint.

(B) Place in an Administrator outside the employing agency the authority to initiate misconduct proceedings before the MSPB against an ALJ on the basis of "good cause."

(C) Make available to an ALJ removed other than for misconduct an alternative appointment in the civil service, whether or not the ALJ was a federal employee prior to his service as an ALJ.

(D) Empower the official who administers the ALJ system to make temporary assignments of ALJs from one agency to another with the consent of the ALJ, and to recommend reassignment of ALJ positions between agencies.

The Association opposes legislative action which would:

(E) Limit ALJ appointments to a term of years.

(F) Provide for flexible pay performance awards to ALJs.

VI.

The Association supports the retention of the membership component of the Administrative Conference of the United States (ACUS), which has contributed valuably to the content and acceptability of improvements recommended by ACUS in federal administrative agencies' procedures.

Senator HEFLIN. We have, next, a panel of law professors, Prof. Frederick B. Davis, University of Missouri Law School of Columbia, Mo.; Prof. Victor G. Rosenbloom of the Northwestern University Law School; and Prof. John T. Miller, Georgetown University Law Center.

We are delighted to have you with us.

If you will come forward, we will be glad to hear from you.

I assume you have written statements, which, of course, would be made a part of the record. And we are delighted to hear from you on what you might like to testify.

It might be a little helpful if it is summarized to some degree.

STATEMENTS OF PROF. FREDERICK B. DAVIS, UNIVERSITY OF MISSOURI LAW SCHOOL, COLUMBIA, MO.; PROF. VICTOR G. ROSENBLUM, NORTHWESTERN UNIVERSITY LAW SCHOOL, EVANSTON, ILL.; AND PROF. JOHN T. MILLER, JR., GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. DAVIS. My name is Frederick Davis, Senator Heflin, and I am delighted to be here and appreciate the opportunity to express some of my views about this problem.

The committee has been supplied with excellent background material and excellent summaries of the ALJ situation. And I don't intend to duplicate that in any way. I think the information is accurate and adequate.

The major point that I would like to make has to do with the Administrative Procedure Act of 1946, because I think therein lies the root of many of the problems that we are dealing with today. I think it has got to be remembered that that 1946 statute was basically a compromise. And what happened was that the minority report of the Attorney General's committee of 1940 was not accepted in the final enactment of that statute. In other words, there was a distinct body of opinion, going back as far as 1940, which said this: There are a distinct body of cases, or proceedings, before administrative agencies which are adjudicatory in nature, which involve discrete interests, and which can be handled by an administrative judiciary.

And the idea was to accomplish, to the extent that experience dictated that it was possible, a separation of powers within that agency, so that judging functions would be handled by judges and legislative functions would be handled by the agency.

Now, that position was rejected in the 1946 act, and we have the ALJ in a kind of a hybrid situation, whereby he is a judge and yet his decision in a discrete case, which we would normally think a litigation between two parties, that decision is subject to intra-agency modification, amendment, change, or reversal.

In other words, you spend a good deal of time and a good deal of effort recruiting good people who can exercise the judicial function. You assign to those people judicial cases, and then you subject that decision to an in-house bureaucratic revision.

I don't think you have to have a JD or a JSD in law to figure out that that's a kind of a wasteful way of going about things.

And although we have received excellent studies from the Administrative Conference of the United States concerning the statistics concerning the time spent by ALJ's, the number of cases, and so forth, we don't have any information as to how much time is spent within the agency by agency review boards, by staff people and others, nitpicking the ALJ's decision.

I think there's a good deal of time and money lost in that process. And I also think that it contributes to the appearance of unfairness.

And so my suggestion, which I have made at other places and at other times, is very simple, not going to the corps concept, but going right to this idea right now, why not make the ALJ's decision the final decision of the agency, with direct appeal from that ALJ's decision into the Federal courts. If the decision is wrong, the courts have full power to reverse it. If the decision is likely to upset collateral matters which are thought to be very important—for example, the ALJ decision in the *Postal Rate* case which undertook to seriously alter the rate structure—if something like that happens, the Federal courts have full power to issue a stay, and the agency as well, has power to issue a stay of that decision.

If a decision or a string of ALJ decisions happens to appear to be inconsistent with agency policy, there's power in the agency to

correct that trend in the normal way that our traditional forms of Government dictate.

In other words, the agency members can adopt a rule which would take care of such a situation. If they think the ALJ's are going off the track, that they're not fully implementing the policy responsibilities given to them, the agency can correct that by simply adopting a rule.

I have never understood why we have to have the ALJ decision subject to this in-house bureaucratic revision.

There are some other anomalies. For example, you have review boards in many of the agencies, which are sandwiched in between the ALJ and the agency members. Those persons sometimes are not as judicially qualified as the ALJ.

As a matter of fact, occasionally you have members of review boards, the very persons who sit and revise ALJ decisions, applying themselves to be appointed as ALJ's. And in one instance that I know of, the three-man interview panel found the review board member the least-qualified person on the panel. And he was the person who was reviewing ALJ decisions.

Now, the argument is made, over and over again, that if you do this, you are shifting sensitive policy responsibilities into a group of people who are not congressional appointees and who are not Presidential appointees subject to congressional approval. That argument doesn't have any weight in my judgment because of the fact that the agency members have the ultimate power to adopt the rules and implement policy, just as Congress has the power to implement policy by enacting legislation. Judges can decide what they have jurisdiction to decide. But when Congress acts, the judges must defer to the will of Congress.

All of this, Mr. Chairman, it seems to me, is much more consistent with our traditional notions of government. The agency members and Cabinet members are political appointees. Because of the nature and circumstances of their appointments, they can be expected—and they should—in the discharge of their functions, represent the ascendant policy of the administration the political aspect of it. It's there.

It is far more appropriate, in my judgment, that those policy notions be expressed in public statements, news releases, rulemaking, enforcement patterns, and so forth. But those policy judgments should not express themselves in the modification or change of judicial decisions made after an adjudication on the record after a trial-type hearing.

Moreover, the appearance of justice would be enhanced tremendously if this in-house revision were abandoned. No longer would it be necessary to explain why, after winning one's case before the judge, you lost it, somehow, within the walls of the bureaucracy. My views here have been largely confined to that proposition.

I do have a few thoughts, however, about the reforms that have been proposed in the various pieces of legislation that have been before Congress. The limited term appointment is a step back, and I think the objections to the term appointment are very sound objections. Our experience at the State level, Mr. Chairman, indicates that once you put a 5-year, even a 10-year, term on a particular job, people are looking over their shoulders at what they're

going to be doing next year. They're not nearly as independent; they cannot be expected to exercise the kind of enthusiasm for the job that you do have in the person who looks at the job in terms of a lifetime commitment.

In substitution for the term appointment, it has been proposed that the administrative law judges be subject to periodic reviews. Now, my problem with that is simply this: when you have a bureaucracy reviewing, or a member of the bureaucracy reviewing, an ALJ's performance, even though that review is not dispositive—has nothing to do with the termination of his job—the reviewing body is building up a dossier on that fellow, and I think it has a counterproductive effect on his whole commitment to the judgment process.

Moreover, when you have an evaluation made, and it's not dispositive with respect to his position, what is he going to do about it? There may be a special reason for an adverse appraisal. But there may be countervailing consideration that the appraiser hasn't taken into account.

How can the ALJ answer an adverse determination that's in his dossier? I am reminded of an experience in one of our States one time, where a law review of a good law school evaluated the work of the Supreme Court. They went through all the opinions, and the article came out and documented all that the judges were doing. It also reported that Judge So-and-so had written only two opinions that term, and that they were in relative unimportant cases.

Well, what happened, allegedly, was that Judge So-and-so had been assigned to some very complex school district realignment litigation, and had spent the whole year working very hard on that, and doing other things—but the point is you had printed adverse determination about Judge So-and-so with no formal opportunity for him to respond.

For these reasons I'm worried about the appraisal technique because it raises a danger that fair judging might be inhibited. I think the best appraiser of the judges' performance is the appellate courts, and that would be, in my judgment, another reason for making the ALJ's decision the decision of the agency. Because if that decision is subject to direct review, either in the district court or the court of appeals, depending upon the statutory mode in question, and it's a bad decision, he's going to know about it.

And I can't believe that an ALJ who has been visited with the fire of a Judge Friendly or a Judge McGowan is going to take that very lightly. This occasionally happens even today. The appellate courts have occasionally criticized the ALJ handling of this or that dispute, and I think that is a healthy and built-in corrective mechanism which doesn't have a lot of the disadvantages that I think these other systems would impose.

We have heard a lot of talk about expertise. My personal position, based on a lot of experience, is that expertise is oversold. I think experts become imprisoned by the grooves of their own expertise.

Mr. Chairman, in my work in Missouri over the last 15 years I have been associated very closely with trial lawyers and the Missouri Association of Trial Attorneys. I know them well, and I participate in many of their activities. I have asked them over and

over again: What's been your experience in administrative proceedings before ALJ's, Social Security, NLRB, and the like?

To a man—or "to a person," I should say—they have all said that they thought that they got a fair shake. What are the criticisms? Well, they say that some ALJ's are arrogant, some of them are vain, some of them are fussy, some of them are nitpicking, but they have never said that they were unfair. They've never said that they thought that the case was already decided beforehand.

Are they happy with the present situation? Yes, they are very happy with the present situation. As a matter of fact, the surprising thing to me has been that my friends in the trial bar in Missouri are much less critical of the ALJ's than they are of some of our Federal district judges. But I don't want to get into that.

Mention was made that perhaps a little State experience would be relevant. I haven't got too much to report on that. We have something in Missouri called the Administrative Hearing Commission, which is a unit which decides discrete cases arising out of occupational and professional licensing and tax disputes; in other words, instead of the hearing being held before examiners of the Department of Revenue or the Licensing Boards they go automatically to our so-called Administrative Hearing Commission.

And that has worked very well. In other words, having adjudication conducted by someone independent from the department has worked well.

I might mention one case, and that involves Dr. Finch. Dr. Bernard Finch was a man who was convicted of a serious crime in California. He was a physician, and after being released from prison he sought to be licensed in Missouri. The Missouri board refused to license him, and that dispute automatically went outside of the board to the Administrative Hearing Commission. The Administrative Hearing Commission, an independent adjudicative body, concluded that he should be licensed, or he should be given the examination, at least, and ordered it to be given.

The board still refused to do it. There was an appeal to the courts, and the courts validated the decision of the Administrative Hearing Commission. That's an example of how fairness, I think, can be achieved within the administrative process, by taking the judicial function outside of the agency itself and giving it to an independent adjudicator.

Now, I am not passing on the merits of the *Finch* case. Whether a convicted murderer who has served his time should be allowed to practice medicine is another question. The interesting thing, to me, was that the Board of Registration for the Healing Arts did not introduce any evidence before the Administrative Hearing Commission to show why having been convicted of murder would adversely affect his capacity to practice medicine. I think if they had, they might have had a better case.

The point is that Finch got a fair shake before an independent adjudicating body.

I think I have used up my time, Mr. Chairman, so I will just say thank you, and be very happy to answer any questions that you may wish to ask.

[The statement follows:]

STATEMENT OF FREDERICK DAVIS, PROFESSOR OF LAW, UNIVERSITY OF MISSOURI, COLUMBIA, MO.

My name is Frederick Davis. I am a Professor of Law at the University of Missouri in Columbia where I have been teaching Administrative Law for the past fourteen years. I am a member of the New York and Missouri Bars, have served on the Council of the Section of Administrative Law of the American Bar Association, have been Chairman of the Administrative Law Committee of the Missouri Bar and have written two articles dealing with the functions of the Administrative Law Judge.

The dramatic increase in the use of hearing officers or Administrative Law Judges by both state and federal agencies is well documented. What the statistics do not reveal, however, is that for many of our fellow-citizens the most significant perceptions about the honesty and fairness of their government will be derived from their experiences at administrative hearings at which a hearing officer or Administrative Law Judge will preside.

Setting aside, for the moment, the state proceedings (workers' compensation, occupational and professional licensing, teacher certifications and dismissals) the federal agency adjudicative caseloads for the years 1975–1978 reveal an almost unbelievable volume of disputes being resolved at proceedings presided over by Administrative Law Judges.

The statistics and the logistics, however, I will leave to others more experienced and qualified. My point is simply this: if confidence in the fairness and integrity of our government is to be maintained it is very important, not only that these adjudications be efficient, fair and accurate, but that they clearly appear to be so to those persons involved in them.

The vast increase in the volume of administrative disputes and the varieties of persons who are now involved in them require a careful review of the existing processes and the assumptions which gave them the fundamental characteristics which they have today.

The Administrative Law Judge, as we know him or her today, was not contemplated by the architects of our early regulatory programs. During the early days of economic regulation, however, it became apparent that when there were complex proceedings requiring semi-judicial or trial-type procedures, it would be helpful for the agency members or the Secretary (as the case might be) to have a functionary preside over, organize and police the proceedings which would produce the ultimate record on the basis of which the decision would be made. Increased utilization of such functionaries and increased reliance on their judgments created the conditions which ultimately conferred upon such functionaries a special status (Hearing Examiners—now, Administrative Law Judges) and greatly enhanced power in the influencing of the ultimate agency decision.

The annointing statute in this process was, of course, the Federal Administrative Procedure Act of 1946. But it should be remembered that that statute was a compromise. A distinct body of opinion favored greater separation of powers within the agency—that is, adjudicators should be separated from rulemakers and investigating and enforcement people should not mix with or exchange positions with their adjudicative and rulemaking counterparts. There was a good deal of talk about an administrative court; or specialized courts which would have complete responsibility for the adjudicative functions presently performed by the agencies. This idea was later picked up by the Hoover Commissions of the early 1950's, and has been suggested as a desirable move by the Ash Council Report of the early 1970's. But it was not to happen. the compromise of 1946 remains pretty much the same as it was at that time, although the practical necessities of day to day administration have pushed the process towards the scheme envisioned by those whose thoughts were rejected in 1946.

The 1946 compromise was a concession to those who believed that the administrative agency should retain "flexibility." This meant that even in cases of trial-type adjudication, separating prosecutors and investigators from adjudicators, or insulating adjudicators from the pressures of biased supervisors was not always desirable. So, there are a number of exceptions made to the so-called "separation of functions" requirements of the Federal Administrative Procedure Act. It also meant that the decisions of those who presided at the trial-type hearings could be reversed by staff-constituted "review boards" or by the agency itself. Despite the more prominent role assigned to the decision of the hearing examiner under the 1946 Federal Administrative Procedure Act, only under the rarest of circumstances would that decision become the decision of the agency. In almost every case it is subject to either bureaucratic revision or rejection by personnel whose appointments need not measure up to those which must be met to be appointed an Administrative Law Judge.

In other words, our present system reflects a substantial concession to a school of thought which has never had much faith in the capacity of the adversary system to produce a correct decision. In my opinion there has always been an elitist group in this country which has had little faith in the traditional procedures of the "law." Such procedures are said to be wasteful, old-fashioned and inaccurate. Professor Ralph Fuchs articulated these misgivings in an early article opposing giving too much influence to those whom we would today call Administrative Law Judges.

"An additional hazard would be created if the hearing officer were more largely removed from the institutional context. This hazard would stem from the methods of advocacy in litigation which, with all of the value that can be rightly credited to them, may serve to distort rather than reveal the truth. . . ."

And so we have a system in which the dispositive responsibilities of the Administrative Law Judge are quite limited—the finding of disputed issues of fact when demeanor evidence is a critical element (true in a very small percentage of cases). They perform other important responsibilities, but their actions are not dispositive. These actions are subject to revision, amendment or rejection by Review Boards and Agency Members who are not appointed with the same sensitive regard for judgment and judicial disposition as are the administrative Law Judges.

I have discussed this anomaly in my articles on the subject and there is no point in repeating it all here. The anomaly can be summed up, however, by noting that we have devised a system for assuring a high degree of fairness, accuracy and insulation from distorting influences in the generation of an administrative decision by an Administrative Law Judge only to subject that decision to a time-consuming and expensive bureaucratic revision by persons who may not be as qualified as the original Administrative Law Judge. Review board members occasionally seek ALJ appeals. One recent panel found the RBM the least qualified of the three applicants—no knowledge at basic statute etc. Yet he reviews ALJ decisions!

Largely because of these anomalies I think that our attention is misfocused today. We are concerned about selection, supervision and retention. It has been argued that the job is not important enough to give it the tenure which it presently enjoys—that, as a result we attract overqualified persons—that, under the present system there is no effective way of evaluating and winnowing out marginal or nonperformers—that there has been an undue compression of Administrative Law Judges into the GS-15 and GS-16 categories—and so on. These criticisms and concerns have some degree of legitimacy if we continue to regard the role of the Administrative Law Judge as that of a mere functionary. I suggest that the inevitable trend of events has been to force upon that role increased responsibilities, despite the compromises of the Administrative Procedure Act. Therefore, as I see it, the time has come to consider the possible advantages, in terms of time, accuracy and efficiency, which might be achieved if the judicial role of the Administrative Law Judge were better recognized. Give his decision the finality of an agency decision. If it is wrong it can be appealed and reversed. If its initial impact is too serious a stay can be issued. If it is inconsistent with perceived agency policy it can be repudiated by the agency's adoption of a rule.

Argument that there would be an undue shift of policy from agency to judges holds no water. Rules are the answer and appellate review.

All of this would be far more consistent with traditional notions of government that the present system. In addition, in my judgment, it would be more efficient. Although not elected, agency members and cabinet members are appointed through the political process. Because of the nature and circumstances of their appointments they can be expected, in the discharge of their duties, to reflect ascendant policy notions and assumptions. It is far more appropriate that those policy notions and assumptions be implemented through public pronouncements, enforcement policies and rulemaking than in discrete cases of administrative adjudication. Moreover, the appearance of justice would be enhanced. No longer would it be necessary to explain why, after winning one's case before the "judge," it got reversed within the walls of the bureaucracy.

My views have been largely confined to the proposition that many of the supposed "problems" which we face with the Administrative Law Judges arise from the failure to recognize that the role is far more important than is recognized by the present statutory structure. Once this is recognized and steps taken to implement greater separation of powers within agencies it is time enough to consider changing the terms of appointment, retention and supervision.

For the moment, however, I need to express disapproval of the term appointment notion. Our experience in the States indicates that if there is one way to ensure that the job of hearing examiner not be taken too seriously it is to give to it the stepping-stone label. With persons moving in and out of those positions, qualified

persons do not last long enough to make any significant impact on the quality of the decision-making.

Similarly, to grant critical evaluational authority to an agency whose chairman is a political appointee without the protection of tenure, which some of the legislative reform proposals would do, would be to invite a devastating politicization of the whole process of supervision, advancement and retention. But these matters have been ventilated and discussed much more thoroughly in other places, and by persons far more knowledgeable than this witness. I am simply recording my observations as consistent with my major theme—namely, that confidence in government would be enchanced, efficiencies accomplished, and present trends and expectations validated if the role of the Administrative Law Judge were strengthened and that his decisions, when made, were to become for purposes of the law and appeal, the decisions of the agency.

Thank you, Mr. Chairperson and members of the Committee. If you have additional questions I will do my best to answer them.

Senator HEFLIN. All right, sir. We will call on each of the others to come forward and give their testimony and then ask questions.

Professor Rosenblum, I believe you are next.

Mr. ROSENBLUM. Mr. Chairman, my name is Victor Rosenblum. I've been a professor of law and political science at Northwestern University in Chicago for some 20 years, and have had the privilege of serving as a congressional staff counsel for a brief period prior to joining Northwestern, and of serving as chairman of the American Bar Association's Section of Administrative Law for the 1977-78 year.

Although I'm aware of no incompatibility between the American Bar Association's resolutions and policies and what I am about to say, I should make it clear at the outset that I am testifying today on my own behalf, and not for any organization.

As a teacher and student of administrative law, I've been especially interested in the roles and functions of administrative law judges. A study I did 5 years ago for the Administrative Conference on "The Administrative Law Judge in the Administrative Process" was published by the House Ways and Means Committee's Subcommittee on Social Security in late 1975, and the draft of a newer study on "Evaluation of Administrative Law Judges: Aspects of Purpose, Policy, and Feasibility" was submitted recently to the Office of the Chairman of the Conference. And I believe the counsel of your committee has a copy of that study, for the record.

The more one studies the administrative process in the United States, the clearer it becomes that the institutionalization of the hearing examiner program under the Administrative Procedure Act has provided a vital instrument of administrative decisionmaking capable of combining fairness, flexibility, and objectivity in the implementation of national policy.

A society yearning for responsive and efficient administration but fearful that whimsy or politics might dominate agency action has found in hearing officers' decisional independence one of the few repositories for public confidence in a crucial phase of the administrative process. This currently warranted confidence would be placed in severe jeopardy if the decisional impartiality and integrity of administrative law judges were compromised in any way through the reintroduction of political accountability as a criterion of continuity in office.

Legislation that would supersede the "good behavior" standard for ALJ tenure with a specific term of years would, at best, subject a currently well-functioning program whose hallmark has been

integrity up to now to the ominous vagaries of "Russian Roulette." At worst, the scuttling of "good behavior" tenure could make the political manipulator or fixer sovereign over administrative action.

Although no sitting Federal judge would be likely to testify before you about how he or she would react to changes subjecting ALJ's to curtailment of their judgmental independence, it would, I think, be reasonable to forecast stricter and more delaying standards of scrutiny in order to assure fairness and substantiality of evidence in the proceedings.

In *Butz* v. *Economou* in 1978, the Supreme Court noted with at least seeming satisfaction that:

> Adjudication within an administrative agency shares enough of the characteristics of the judicial process that those who participated in such administrative adjudication should also be immune from suits for damages.

More importantly, the Supreme Court went on:

> The process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him free from pressures by the parties or other officials within the agency.

Building on the Supreme Court's recognition of ALJ decisional independence in *Butz*, the Second Circuit Court of Appeals in January of this year, in *Nash* v. *Califano*, ruled that an ALJ has standing to sue when an agency allegedly interferes with such decisional independence. While pointing out that his decision dealt in no way with the merits of Judge Nash's contentions that the agency established arbitrary monthly production quotas and counseled ALJ's to bring their reversal rates in line with the national average, on pain of sanctions, Judge Kaufman held for the unanimous three-judge panel that:

> Express prohibitions on performance evaluation and substantive review" by the ALJ's agency in 5 U.S.C. 4301 and appellant's position description promulgated by the Bureau of Hearings and Appeals gives his injury the required direct impact upon statutorily created rights to give him standing to sue.

Does protection of the decisional integrity of ALJ's through the provision that removal may be "only for good cause established and determined by the Civil Service Commission" (now the Merit Systems Protection Board for purposes of this provision) as provided in 7521 mean that ALJ's are or should be unaccountable for defective performance and improper behavior? Certainly not!

It may be true that zealotry has not been evident until now in enforcement of the "good cause" standard, but the Merit Systems Protection Board made it clear and unequivocal in an important decision in March of this year that malfeasance in ALJ performance is subject to the removal sanction.

The Merit System Protection Board's ALJ, in a carefully drafted opinion, had previously ruled in this case that judicial independence must not be equated with judicial immunity. Although it is well established that a judge cannot be removed because of mistakes in judgment, nothing in the Administrative Procedure Act or in the *Butz* opinion "can be construed as precluding removal of an ALJ for misconduct, incompetence, or other failings in the performance of adjudicatory duties," the Merit System Protection Board ALJ found.

Given the facts of the particular case, the ALJ for the MSPB found that conducting a hearing and issuing a decision after juris-

diction legally had been taken away from an agency ALJ are "the antithesis of law and order which the judge personifies." Such delicts constitute a good cause to support removal.

In upholding the ruling of its ALJ, the MSPB stressed that "no judge has carte blanche authority to conduct the Government's business in a biased and destructive fashion." The Board literally promised that it would "not neglect its duty" in fulfilling the necessary balance between judicial independence and judicial accountability.

In addition to conscientious enforcement of the legal accountability of ALJ's by the MSPB pursuant to the APA's standard for removal, I favor development of a rigorous and systematic program for evaluating ALJ's so as to maximize self-improvement.

I've proposed the outlines and foundations of such a program in my draft report of May 1980 to the Chairman of the Administrative Conference. In essence, my position is that an evaluation program can be structured and administered so as to produce useful, valid qualitative and quantitative propositions about ALJ performance. Essential to such a program is detailed, dispassionate inquiry into and analysis of the multiple attributes and skills that comprise excellence and competence of performance by individual judges and by their employing agencies.

It is essential, in my view, that agencies as well as ALJ's be included in the evaluation program, for such factors as clarity and consistency of agency policies can wield powerful effects over both the appearance and reality of ALJ performance.

Under the aegis of a proposed new advisory committee on ALJ evaluation, questionnaires and other instruments for obtaining informed opinion about judges' performance would be developed and administered to representative samples of lawyers, parties, and witnesses who have appeared before the ALJ.

The questionnaires would utilize multiple attribute criteria drawn from approaches developed and applied in ongoing research by the American Judicature Society, New Jersey's Office of Administrative Law Judges, the Administrative Conference's Uniform Caseload Accounting System, the District of Columbia's Commission on Judicial Disabilities and Tenure, the Chicago Council of Lawyers' and other relevant bar groups' polls, and the La Macchia and Sharon studies for the Civil Service Commission and the Office of Personnel Management.

I'd be happy to discuss my suggestions in greater detail at a suitable point. What I would like to stress in summing up at this stage is: First, the judgmental integrity and independence of ALJ's must not be truncated or compromised; second, once appointed in accordance with OPM standards, ALJ's should continue to be subject to removal only for "good cause"; third, decisional independence does not require or countenance denial of accountability for incompetence and impropriety of performance in office; and fourth, a rigorous, systematic program for performance evaluation of ALJ's, as a spur to self-improvement, is complex but feasible and should be administered in conjunction with regular periodic evaluations of their employing agencies.

As I started to emphasize, such performance evaluation would be designed to spur self-improvement and actions. They could also

lead to complaints against individual ALJ's to be heard through current MSPB procedures.

The evaluation should not, however, be used to alter the salary or employment status of any ALJ through a bypass of the Merit Systems Protection Board's procedures for removal for good cause.

Senator HEFLIN. Thank you.

Professor Miller, we would be glad to hear from you.

Mr. MILLER. Thank you, Mr. Chairman.

My name is John Miller. I have a prepared statement and if that may be placed into the record.

Senator HEFLIN. It will be.

Mr. MILLER. I am a practicing lawyer in the administrative law field, as well as an adjunct professor at Georgetown. I have practiced in the administrative law field for over 25 years and taught at Georgetown for over 20 years.

My experience with the administrative law judge system runs back to about 1963, when for a period of years I served as a liaison between the American Bar Association and the Civil Service Commission when it initiated the present system by which judges are recruited.

During those years, I had an opportunity to see how this system functioned, and from that make criticisms which in a sense amuse me today, when I hear people talking about selective certification, and often voicing the subject with some indignation.

I wrote an article in 1968 which is cited in a footnote to my statement called, "The Vice of Selective Certification in the Appointment of Hearing Examiners," and here we are some 12 years later still talking about the subject.

And I don't believe there has been a single, official word from the Hill yet expressing any sense of indignation or criticism of the propriety or the arrangement.

Senator HEFLIN. I only read it last night or the night before.

Mr. MILLER. There have been, for example, certain statements—there is one that appears in volume 4 of the "Study on Federal Regulation" published in July 1977. This is a Senate Document 95-72, and I believe this was pretty much a staff study.

And there is said about selective certification, at page 107:

"The practical effect of selective certification has been to make it difficult for anyone other than a former member of the agency's general counsel's office to qualify for an ALJ job in that agency."

In 1978, the Comptroller General, in a report to the Congress of the United States, a report entitled, "Administrative Law Process: Better Management is Needed," stated at page 46:

"We also note that selective certification, a practice which generally results in agencies hiring their own staff attorneys to be ALJ's, may be adversely reflecting on the impartiality of the administrative adjudication process."

My objections to the selective certification are spelled out in my statement, and I will answer questions about it, but I won't dwell further on it at the moment.

I would rather like to spend a few minutes on a couple of other aspects of the subjects you have been discussing.

One is the necessity to see what has been done of a positive nature in this program. As others before me have cautioned, one

has to appreciate the good that is in the present system; otherwise any remedy will cause more harm than good.

Now, a lot of good has occurred. We believe the quality of the candidates being appointed now is better, despite our criticism or my criticism of selective certification.

One of the most interesting developments recently has been to place a former administrative law judge as head of the Office of Administrative Law Judges, in OPM, and to assign to that gentleman a new list of tasks, among which are the duty of coming up with standards against which the judges' conduct might be measured.

He also has the responsibility for developing the judges themselves, which I read as meaning to improve the educational system for the judges.

A lot has been done in this area, but a great deal more has to be done. Very few of the administrative law judges in the Federal service actually participate each year in the programs given at the National Judicial College in Reno.

I can say from my own observations that it has been a lack of encouragement on the part of the departments and agencies as well as a lack of money; perhaps the two go hand in hand.

More has got to be done in this area, and can be done.

The role of the judge, as Professor Rosenblum has pointed out, has been recognized in the court decisions as being one which has attained an independence. But in view of your discussion about policy and adjudication and its relation possibly to the establishment of a judicial corps, I would like to make a few observations in that area.

When much of the legislation we are dealing with today was enacted in the 1930's, there was a notion that these agencies, specialized agencies, would acquire an expertise which the courts could not attain, and therefore had to have a different way of admininstering themselves.

One of the disenchantments of our time has been the dwindling public confidence in the expertise of these agencies, a situation not helped by the fact that Congress continues to multiply the agencies and turn out a torrent of new laws which makes it difficult for the bar itself to become expert, much less the agencies where we have a very heavy turnover, oftentime in the agency members as well as the agency staffs.

Second, the court of appeals was expected to play, I believe, a more effective role in this system than it is today. The court of appeals is between a rock and a hard place.

I have had the experience of arguing cases in the court of appeals on appeal from a Federal agency where the judges on the panel knew more about the law and had more experience under the law than the agency members who had rendered the decision we were challenging.

Yet this court of appeals is under a hammer from the Supreme Court, expressed in such decisions as *Vermont Yankee* which tells them not to replace the agencies' decisions with their own predilections.

So what is happening is that the courts of appeals are either intimidated, and I do believe I see evidence of that—in other words,

they throw up their hands and affirm, rather than get in a wrangle which may end up in a reversal in the Supreme Court.

Or the courts of appeals are becoming more and more skillful, if not esoteric, in figuring ways to send the case back to the agency without stirring up the Supreme Court.

As a result, the remands are becoming thinner and thinner in terms of being any help to the litigant.

I had a situation where recently a case has been remanded for as long as 2½ years without the agency doing anything on remand, on the theory, well, the court left the order in effect; it remanded for further consideration. By no consideration, of course, the thing is left the way it is.

There is a certain amount of disintegration that is going on in this system.

The soundest development I see in the picture has been in the administrative law judges' function. And I think as a result there is a growing confidence on the part of the court of appeals in the administrative law judge's decision as opposed, let's say, to the agency's action, on review.

Now, you discussed the question of policy and adjudication. I have been working as a lawyer in the area where the agency has been issuing statements of policy.

The court of appeals, particularly in a case called *Pacific Gas and Electric* v. *Federal Power Commission*—I believe it was decided about 1973—pointed out that there is a clear distinction between a policy statement by an agency and what might be called rulemaking or adjudication:

If the agency wants to make law, it has to do it by rulemaking and meet the requirements under the APA of that, or it has to go through an adjudication, which is another device for effecting policy and making it law.

The statement of policy has a salutary effect in instructing the staff of the agency as to the course they should follow, and if they have a function—and sometimes they do in deciding whether a matter should be set for hearing—following the policy of the agency, they may not set it, which is advantageous to the claimant or the petitioner.

Now, I realize there are cases before administrative law judges in certain agencies, particularly social security, where there may be no agency lawyer present. Years ago, it was a case where, I think, 60 percent or more of the social security cases had no lawyer present.

That situation has been rectified, I believe, because it is now more economic for lawyers to participate.

But where that situation exists, it is difficult, you might say, for the agency policy to be expressed in an unadulterated form to the administrative law judge.

But I don't think the problem is quite as great as some of your questions, Senator, might have indicated, that is, as to the judge usurping the policy decision.

We all have cases nowadays with new legislation where the administrative law judge may be the first person to express much of an opinion on a given fact pattern. You can charge him with determining policy. I don't think that's what people mean when

they say policy; what they mean is the agency acts in a way which tries to tell everybody how things should be decided.

Most of us feel more comfortable when the agency does that on a record, whether it is through a rulemaking or adjudication; and not leave it to some groundswell of intuition to let everybody know what the law ought to be.

I am ready to answer any questions you might have. My statement does get into the problem of limited terms, evaluation, and so on, but I think enough has been said already on those subjects.

[The statement follows:]

STATEMENT OF JOHN T. MILLER, JR.

My name is John T. Miller, Jr. I am a lawyer, practicing primarily in the field of administrative law. My office is at 1001 Connecticut Avenue, N.W., Washington, D.C. For twenty years, I have been an adjunct professor at Georgetown University Law Center.

What I know about the recruitment and appointment of administrative law judges I have learned through the Administrative Law Section of the American Bar Association, which I have served as Chairman. I acted for eight years as liaison between the American Bar Association and the Civil Service Commission in connection with the Commission's program for recruiting and examining candidates for appointment as administrative law judges under the Administrative Procedure Act. As a member of panels appointed by the Commission, I helped interview a large number of lawyers seeking to become administrative law judges. Based on these experiences, I wrote several articles evaluating the Commission's recruitment and educational programs and urging reforms.[1]

I served in 1979 as Chairman of the Committee on Liaison with Administrative Law Judges of the Federal Energy Bar Association which considered pending legislation affecting the tenure of administrative law judges and made recommendations which the Association adopted and submitted to Congress.

I have testified during the past two years on legislation Concerned with the tenure of administrative law judges before committees of the House of Representatives and United States Senate.[2]

Since 1974, I have lectured twice a year at seminars given for federal and state administrative law judges at the National Judicial College in Reno, Nevada.

My comments today are directed specifically to the subject of the extent to which recruitment, supervision and retention affects the independence of administrative law judges, and whether a different structure would better serve the purpose.

We are concerned with a process and an institution which is thirty years old. Therefore, I would like to begin with an assessment of the present system.

The Office of Personnel Management (OPM) inherited the Civil Service Commission's historic responsibilities for the recruitment and appointment of administrative law judges under the Administrative Procedure Act. It has continued to effect a reformed system instituted by the Commission under Chairman John W. Macy, Jr. in 1963.

At the time the APA was adopted in 1946, each department and agency was using its own methods and standards for appointing hearing examiners, as they were then called. An evaluation was made to determine the qualifications of the incumbents to perform their duties under the new legislation. It proved a failure. Some quite

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[1] See "The Civil Service Commission's New Hearing Examiner Program," 17 Ad. L. Rev. 104 (1964); "The need for improvements in the Hearing Examiner recruitment program of the Civil Service Commission," 19 Ad. L. Rev. 310 (1967); "The vice of selective certification in the appointment of hearing examiners," 20 Ad. L. Rev. 477 (1968); "Continuing legal education of lawyers in federal service and the Federal Administrative Justice Center Proposal," 115 Cong. Rec. E661 (1969), 21 Ad. L. Rev. 267 (1969); "The Administrative Conference of the United States, Hearing Examiners and Continuing Legal Education," 22 Ad. L. Rev. 617 (1970); "CLE for the Government Lawyer: the proposed Federal Administrative Justice Center," 24 Ad. L. Rev. 355 (1972), D.C. Bar Journal, 1973; 24 Ad. L. Rev. 355 (1972), D.C. Bar Journal, 1973; "The education and development of administrative law judges," 25 Ad. L. Rev. 1 (1973).

[2] I appeared before two committees of the United States Senate last year to testify on S. 262 and S. 755: on June 5, 1979 before the Committee on Governmental Affairs and on July 26, 1979, before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary. On January 29, 1980 I testified before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on Judiciary on H.R. 3263 and H.R. 4233, and on April 17, 1980, before the Committee on Post Office and Civil Service of the House of Representatives on H.R. 6768.

suitable hearing examiners were attacked on philosophical grounds; others who should have been removed were left in office.[3]

The 1950's saw little improvement as new hearing examiners were appointed. The ABA became so dissatisfied that it urged that the responsibilities be taken away from the Civil Service Commission. To meet these criticisms, the Commission reformed its system in 1963. An Office of Hearing Examiners was organized, with a Director who had direct access to the Chairman of the Commission. On the advice of a committee of experienced agency officials and members of the bar, the recruiting and examination standards were raised. Candidates thereafter had to be experienced administrative lawyers. They were required to demonstrate their competence in legal writing. Each was examined by a panel consisting of a high-ranking Commission official as chairman, a lawyer in the Government service and a member of the ABA, the latter two experienced in the administrative process.

During subsequent years, the Administrative Law Section of the ABA continually analyzed and evaluated the system. When it was found that the standards inadvertently barred the bulk of the bar from consideration as candidates, the Commission was persuaded to amend the requirements by recognizing trial experience as a surrogate for administrative law experience. In time it became obvious that the title "hearing examiner" was inadequate. The bar supported efforts which led to adoption in 1972 of the title "administrative law judge," a development which I believe has improved both the quality of candidates for appointment and the judicial demeanor of those in office.

These accomplishments should lead no one to believe that the present system requires no further reforms. But changes which fail to respect what has been learned from this long experience will do more harm than good. The proposed limited term appointments for ALJ's does not meet that test.

The trend to more and more strict ex parte rules and the proliferation of regulation by rules have served to create a gulf between the affected public and the ultimate decisionmakers in each agency. Department heads and agency members are distant figures. The ALJ provides a bridge of credibility by a strong image of fairness, high-mindedness, knowledgeable concern and competence.

It is more important, today, rather than less, that the ALJ not only be independent of undue influence but appear to be independent.

For thirty years ALJ's have been recruited on the premise that they were entering upon a career service. Lawyers left behind them private practices which they cannot reenter or rejuvenate after a period of years. Lawyers in public service passed over alternative career opportunities when they became judges.

There is legislation pending before the Congress (S. 262, for example) which would place all ALJ's under a limited term appointment. This is a mistaken course. To quote a report submitted by the Federal Energy Bar Association to Congress:

"Such a practice will lower the quality of candidates for such appointments, discourage applicants from the private bar, expose the judges unduly to pressures from the agency staff and outside political forces, and undermine the independence of the ALJ's which has been a keystone of the Administrative Procedure Act since its original enactment."

I oppose limited term appointments because, in my judgment, they would infect the administrative process by weakening public confidence in its fairness and competence. The more capable candidates for appointment as administrative law judges would be driven away.

The trend to more and more strict ex parte rules and the proliferation of regulation by rules have served to create a gulf between the affected public and the ultimate decisionmakers in each agency. Department heads and agency members are distant figures. The ALJ provides a bridge of credibility by a strong image of fairness, high-mindedness, knowledgeable concern and competence.

It is more important, today, rather than less, that the ALJ not only be independent of undue influence but appear to be independent. Appointments for limited term would disastrously undercut both the image and the reality.

I have had to contest agency staff lawyers in public hearings. I am only too aware of what will happen should limited terms become the rule. At present, the ALJ "exercises his independent judgment on the evidence before him free from pressures by the parties or other officials within the agency." *Butz* v. Economou, 438 U.S. 478, 513 (1978). Administrative law judges, apprehensive of reappointment, will flinch from antagonizing staff lawyers who, we can be sure, will methodically build dossiers of complaints against incumbent judges who do not "think" right in the staff's

[3] See Macy, "The APA and the Hearing Examiner: Products of a Viable Society," 27 Federal B.J. 351, 367-369 (1967).

view. Yet it is independence from that very staff which the Administrative Procedure Act sought to provide the ALJ for the benefit of the public.

I cannot imagine that capable lawyers will give up good private law practices to embark upon a seven year or ten year term appointment, unless that term coincides with the closing years of their intended careers. Really able younger lawyers in private practice will not seek to become ALJ's. The job will attract lawyers who by temperament and design are able to survive in a world where political "pull" rather than competence provides assurance of reappointment. A sort of Gresham's law will operate; the baser currency will drive out the better.

I have heard it argued that administrative law judges should have limited terms because judges of the Superior Court of the District of Columbia are appointed to limited terms. I realize, as a long-time resident of the City of Washington, that what goes on locally is sometimes of national interest. But one cannot ignore the fact that the Superior Court is a city court. It has evolved in stature and responsibilities under Acts of Congress. But that has not raised it above the level of the parochial concerns with which such a court must contend.

The ALJs, by contrast, are members of a unique national judiciary. They render decisions under federal laws having national scope. They are recruited from the bar throughout the country. This means for some an uprooting and migration to distant communities where they may reside for years. For others, duty takes them on itineraries to hear cases in cities and towns throughout the nation.

There is nothing in the status of the Superior Court comparable to the unique relationship between ALJ and the federal agency which employs him. The ALJ is expected to follow agency precedent and policy laid out in prior decisions, rules and regulations. At the same time, and within those parameters, that judge must be independent. No Superior Court judge is called upon to walk such a tight rope.

Issues decided by ALJs are of sufficient national importance that they may ultimately be reviewed by United States Courts of Appeals and the Supreme Court of the United States. Decisions of the Superior Court of the District of Columbia, reviewed by a local court of Appeals, are in quite another domain.

It requires no skill in prophecy to recognize that the enactment of legislation requiring limited term appointments will result in a situation where most ALJs will come from the ranks of the federal bureaucracy. As the present system has tended in that direction, due to a defect in its administration rather than any aberration in the law, a few words on that experience may be in order.

Since 1953 a practice called "selective certification" has permitted certain agencies to appoint an inordinate number of administrative law judges from the agency staff.[4] The purported justification is an alleged need for immediate expertise in order to expedite the disposition of case loads. This does not justify the practice.

No lawyer should be appointed an ALJ who lacks the energy, intellect and discipline to acquire needed expertise. A client expects no less from any good lawyer he employs. To sacrifice intrinsic qualities of character, competence and judicial temperament for a temporary advantage in the form of expertise in a narrow field of the law is simply a poor bargain. Initial expertise is sometimes illusory and, in the face of a rising tide of laws and regulations, and case decisions, evanescent unless kept up to date.

The demand for expertise can be given whatever respect it requires by appointing judges early enough to allow time for necessary study and continuing legal education programs. No agency appointing an ALJ provides assurance of a career-long employment. Why should any employing agency be afforded the right to dictate the credentials of those who enter a judicial service which may well be performed in later years before other departments and agencies?

It has not been in the Anglo-American tradition to appoint lawyers as judges on the basis of a narrow, and, perhaps, temporary expertise. Congress has not demanded such pre-acquired expertise as a requisite to employment as an agency lawyer or appointment as a member of an agency. Nor has specific expertise been a necessary qualification of judges appointed to the federal courts which review agency decisions.

Selective certification unnecessarily creates an air—if not the reality—of agency bias. It frustrates nationwide recruitment efforts designed to attract to federal service competent lawyers capable of mastering new fields of the law and rapidly evolving administrative challenges.

S. 2147, the Regulatory Flexibility and Administrative Reform Act of 1979, moved in the right direction. It rejected limited terms for ALJs and maintains the present career service. But were it to become law, S. 2147 would worsen the present system

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[4] See Mans, "Selecting the 'hidden judiciary': how the merit process works in choosing administrative law judges (Part II)," 63 Judicature 131, 135 (1979).

dramatically in one respect. Section 802(2)(B) of that bill provides that eligible candidates "shall be ranked and certified in numerical order *or by category.*" (Italics supplied.) In describing the purpose of the provision, Senator Culver stated (Cong. Rec. December 18, 1979, S19063): "An example of specialty would be expertise in Labor Law." As the same bill requires agencies to pick from the top ten names in the appropriate register of eligibles, this means that any time the specialized register of eligibles for a particular agency contains less than ten names, that agency can assure the appointment of its own staff attorneys as ALJs by the simple expedient of encouraging them to apply for the register. This is no mere speculation. On September 3, 1980, nine of the specialized registers used to implement selective certification had less than 10 eligible candidates listed:

Agency:	*Number of eligibles on the specialized register*
Department of Agriculture	1
Civil Aeronautics Board	3
Department of Labor	0
Federal Communications Commission	6
Internal Revenue Service	0
National Labor Relations Board	9
Securities Exchange Commission	2
Social Security Administration—Puerto Rico	2
Coast Guard, Department of Transportation—Primary specialty	3

No different numbers of specialized candidates could be assured by S. 2147 or other legislation.

While I favor legislation which would enable each egency to appoint from among the top ten on the register of eligibles, any reform legislation ought to bar the agency inbreeding which legislation like S. 2147 facilitates. Such inbreeding would retard the appointment of minorities and women as judges, nullify effective nationwide recruitment of candidates, reduce the quality of appointees, and undercut efforts to develop a corps of ALJs capable of serving wherever needed in a federal service.

A nationwide recruitment base of capable lawyers in public as well as private practice is the best source of competent, independent administrative law judges able to give to our laws the credibility, and the efficient and competent administration which are needed.

It has been argued that limited terms are necessary in order to assure periodic evaluation of ALJs. I disagree. To the extent an evaluation reform is necessary, it can be effected under the present system of career service. What is needed now is leadership, new standards of performance and a willingness to improve the evaluation process through study and application.

It is too early to appreciate what the replacement of the bi-partisan Civil Service Commission with the head of an agency (OPM) appointed by the President will mean in terms of the attainment and maintenance of a high-quality program for the recruitment, supervision and education of administrative law judges. A very positive step forward was taken earlier this year when, for the first time, and administrative law judge was appointed head of the OPM's Office of Administrative Law Judges. Among his other responsibilities, he is charged with the duty to develop appropriate standards for the evaluation of the performance of ALJs, and an adequate education program. Let me address the subject of education first.

With the encouragement of the American Bar Association, the Civil Service Commission initiated a continuing legal education program in the 1960's for administrative law judges. It did not flourish. The ABA then asked Congress to establish a Federal Administrative Justice Center which would be responsible for encouraging continuing legal education for both the hearing examiners and the then 10,000 lawyers in federal service. The legislation aborted in the face of Civil Service Commission opposition.[5]

Working through their own organizations, the administrative law judges have since made notable progress in filling the void through seminars organized at the National Judicial College and elsewhere. What is still lacking, I believe, is sufficient financial support and encouragement on the part of OPM, as well as the departments and agencies employing the ALJs.

The present process for disciplining ALJs was established by the Administrative Procedure Act. Agencies may not fire ALJs out of hand. The independence of the ALJ is protected by a system under which the employing agency may complain to

[5] See "Federal Administrative Justice Center," hearing before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, on S. 3686, 91st Cong., 2d Sess., June 22, 1970.

OPM. After a hearing before an ALJ of the Merit Systems Protection Board (MSPB), an initial decision and exceptions thereto, the ALJ may be disciplined by the Board should that result be justified on the record. Judicial review may follow.

Various pending legislative proposals would provide for periodic evaluation of the performance of ALJs, to discover not only cases of misconduct but also (a new standard) unacceptable performance.

Several reasons are given for these proposals: Employing agencies do not evaluate ALJs, nor do chief ALJs in every case. There in no formal and systematic system of evaluation. There have been very few cases of actual disciplinary action, suggesting that accountability for performance is largely non-existent. (See Cong. Rec. January 31, 1979, S877.)

If periodic evaluation is to add anything constructive to the present procedure, it should serve to surface inadequacies in ALJ performances which do not come to light under the present complaint procedure and which warrant consideration for disciplinary purposes. But can a process be devised which neither serves to undercut the independence of the ALJs nor discourages highly-qualified lawyers from seeking to become ALJs? I will attempt an answer to this perplexing question.

1. It is not necessary to transfer functions from OPM to the Administrator of the Administrative Conference of the United States in order to establish review boards. Such boards could operate under the supervision of the head of the Office of Administrative Law Judges in OPM and be given authority to recommend to him appropriate measures—including the filing of a complaint with the Merit Systems Protection Board.

2. The legislation should be specific as to who shall be the appointing authority, and the size and composition of the boards. They should consist of ALJs, lawyers in and outside of government services, and non-lawyers with a discernable interest in improving the quality of justice. Agency employees should be afforded an opportunity to present their views before the boards but they should be barred from membership on a board reviewing an ALJ employed by the same agency.

3. The periodic evaluations should serve not only to provide insights into the performance of the particular judge being examined, but also to spotlight other inadequacies in the administrative process such as needs for continuing legal education for both ALJs and lawyers appearing before them; inadequate agency procedural rules; undue interference with the functions of the ALJ by agency members and staffs; inadequate hearing room facilities; and lack of secretarial, law clerk and other necessary staff support for ALJs.

4. The periodic evaluation and the processing through a review board of an agency complaint against an ALJ, as well as a complaint emanating from the public, should be handled in a manner to protect the ALJ from harassment. Findings of the board should be treated as confidential, unless the board concludes that a proceeding should be initiated before the MSPB. In all other cases, dissemination should be made only to the ALJ under review and his Chief Judge, but not to the agency head or other agency officials. Only in this way can the board expect to elicit candid evaluations of ALJs. The legislation should forbid access to board reports under the Freedom of Information Act.

No review board should recommend the filing of a complaint with the MSPB without first affording the ALJ an opportunity to appear and present reasons why such a complaint is not warranted.

The Administrator, Director of the Office of Administrative Law Judges or other person to whom the review boards are required to make their reports and recommendations should be allowed discretion to resolve the matter without filing a complaint with the MSPB if he finds that the efficiency of the service will thereby be better promoted. However, no complaint should be filed with the MSPB unless a majority of the review board so recommends.

5. The fact that the standard of "unacceptable performance" for evaluating ALJ performance is novel should be respected. The Director of the Office of Administrative Law Judges should be required to organize a special committee assigned responsibility to develop sound criteria for application by the review boards. The best protection against an abusive use of the new standard will be found in a sensible composition of the review boards. Experience with the new standard ought to be evaluated by Congress after a period of five years to determine whether its interpretation and application are serving the public interest in assuring independent and competent ALJs. It may then be found desirable to legislate a more precisely defined standard of unacceptable performance.

6. The MSPB ought to be afforded the same discretion in choosing a remedy in an unacceptable performance case as it has in a misconduct ("for cause") case. Removal or reduction in grade may be sufficient for most cases, but experience may demonstrate that a different remedy is warranted in certain situations. This could be the

case where an ALJ unable to cope with the workload in an agency with a heavy docket is found quite capable of performing well in another agency with a different docket.

I believe that there is room for further evolution in the system of employing ALJs. While I believe it desirable for the judges to work for a time in a particular area of expertise, I do not think it necessary that they be employed by a particular agency as they are at present. A step in the right direction is the "bench" of judges working out of the OPM's Office of Administrative Law Judges who would serve the needs of departments and agencies needing additional help on a temporary basis as well as of agencies who do not have enough judicial work to warrant full time employment of a judge. This program could be expanded, by additional authority, to develop a "bench" of all of the judges working in a general area, such as that of economic regulation.

Senator HEFLIN. Do you share some of the views of Professor Davis in regards to the decision of the administrative law judge being the final decision of the agency?

Mr. MILLER. Well, I suppose my confidence in that course depends on the quality of the judge I am trying the case before.

I think a greater finality would make the whole process more speedy and expeditious. Under the laws with which I work, the agency has no time limit within which to act and a practice which I think I can characterize as invidious has been creeping in, where the agency will grant rehearing for the purposes of further consideration.

I can think of an order, an important one, decided 3 years ago—and nothing further has happened. In other words, the agency can muff the ball, and that's the end of it for practical purposes. You can't go the court, you can't go anywhere.

At least with the administrative law judge, he stands out there in front of the public, he is very visible. If his decision doesn't come out soon, you know it becomes a matter of public note, if not criticism.

So I would say yes, to the extent the judge's role can be strengthened, it is a positive step.

Senator HEFLIN. If you followed it, you would have to have pretty well from the executive branch some type of instructions or its predeterminations of at least general policy pertaining to rules, or pertaining to laws that might be passed.

Mr. MILLER. Not if you have a certiorari-type relationship between the judge and the agency, where the agency on its own motion can take the case if it thinks the judge's decision—you know, has knocked the ball out of the park in the wrong direction.

I think the agency still has an opportunity to stop and look at the decisions it thinks are out of line.

But I don't think personally it is possible for agencies to cover every eventuality through a rule. And in fact, I find myself with a growing sense of uneasiness as these rules proliferate and I am finding it harder and harder to get the agencies to correct rules.

So I don't like to see them go in that direction. I happen to prefer the adjudication route, perhaps because the problems I am often confronted with are kinds that depend on their own particular facts and circumstances.

Senator HEFLIN. Do any of you have any feelings on the present scope of review by Federal courts of the administrative decisions?

Mr. ROSENBLUM. I do. I think the present scope of review by the Federal courts is increasingly effective. It shows a sophisticated

understanding of the adminstrative process, and I would like to see it enhanced rather than interfered with.

I think that there is some legislation pending in Congress that could complicate the exercise of that review.

Beginning with the decisions of the Supreme Court after the adoption of the APA, highlighted by such decisions as the *Universal Camera* case in 1951, centrality of the role played by the hearing officer in the decisional process was recognized.

Since that time the Court has increasingly recognized the utility and integrity of the administrative process insofar as it is related to the functions of the administrative law judge.

I think that we have seen in recent years at the appellate court level more and more intelligent, receptive, sophisticated analysis and construction of the tasks before the agencies. There has also been an important admonition that the Supreme Court has been directing both to Congress and to the agencies and that is to try to speak more clearly with regard to the particulars of the authority that is being conveyed.

Ambiguity begets uncertainty all the way up the line, and complicates the task of review. And the more specific Congress could be in spelling out the lines of authority of the agencies and consequently the more specific the agency officials could be in the delineation of their policy, the faster and more efficient would be the process of decisionmaking.

Mr. DAVIS. I tend to agree with Professor Rosenblum.

I would just add, especially when he says that during the last 10 years the reviewing performance of the Federal courts has improved, that I agree and am pleased.

I think this, however, that too much confidence is placed in the formulas, clearly erroneous, substantial evidence, in the light of the whole record, and all that sort of thing.

All those formulas do is to convey a hint to the judges as to what the congressional expectations are: in the final analysis, you need darn good judgment in the federal judiciary. Formulas can't do it.

The formulas can provide a logical basis for a decision one way or the other, but no formula can really control what is basically a very sensitive, judgmental process.

Mr. MILLER. The growth of ex parte rules has distanced the decisionmakers at the administrative level from the public who are seeking remedy. The administrative law judge is the only person they directly deal with.

When his decision goes to the head of the department or agency or the commissioners, there ordinarily is no oral argument or any direct confrontation which permits the claimant or the petitioner or the litigant respondent to have any sense that the decisionmaker heard and decided his case.

The Sunshine Act, opening meetings of regulatory agencies, is demonstrating that the staff are writing the opinions and giving oftentimes the agency only one option to consider—that is, the staffer's views as to how a case should be decided, a member who may have been there only a couple of years.

So we have this interesting spectacle that the only time after the administrative law judge decision that the claimant or petitioner has a chance to talk to a decisionmaker is at the court of appeals

level, and there you have at least the sense that these people have read your brief and they have asked questions about it.

Now, that to me has become a vital part of the system and a vital part of maintaining the integrity of it. That is why, I suppose, I have some misgiving at the role the Supreme Court has begun to play in terms of beating back a more activist role on the part of the court of appeals; I don't think it is a healthy development.

Senator HEFLIN. Do either of you want to comment on the so-called Bumpers amendment concerning judicial review.

Mr. ROSENBLUM. I guess the professors are in the enviable position of being able to make comments without accountability.

Senator HEFLIN. That's historical.

Mr. ROSENBLUM. Senator Bumpers is a distinguished graduate of the Northwestern University School of Law, and we are all immensely proud of the distinction that he has brought to his career. However, many of us do not share his views with regard to the particulars of the amendment, and would view the amendment, at least in its original form, as containing provisions that unnecessarily and inadvisedly would complicate the function of the performance of judicial review on the part of the courts.

In its more recent form, it is a little hard to know exactly what it means, because fudging language has been brought in that will create additional ambiguities that could conceivably enable the courts to function as they have been functioning all along.

But I don't know that there would be any advantage in passing yet one more ambiguous measure through the legislature.

Mr. DAVIS. I don't quite agree with Professor Rosenblum.

I don't view that Bumpers amendment with too much alarm. To me, it is simply another signal, another signal from the Congress as to what they expect of the Federal judiciary. It is rather like, as I think Professor Clark Byse mentioned in a report to the Council on the section of administrative law, the "substantial evidence in the light of the whole record test" controversy that grew up in the late forties. Congressional dissatisfaction with the role played by the courts of appeals in respect to Labor Board decisions was expressed in the Taft-Hartley Act and the courts responded.

I think Bumpers amendment simply reflects a growing sentiment that some of these rules may be adopted without too much reflection. They are very oppressive in some circumstances, and they are not discriminating enough in other situations. I think the Bumpers amendment simply represents a legitimate political reaction to this.

What we want is for the agencies at least to demonstrate that the rule was carefully thought out, and show why it should be the rule that it is. After all, satisfying the burden of proof can be pretty easily done in a situation of that sort.

I don't view the Bumpers amendment as being that significant a factor. I don't view it as being a horrendous revolution.

Mr. MILLER. I have sometimes thought that under the present system, the U.S. Government, in the administrative process, is the only person who can afford to have an inexperienced lawyer. It's often the case. I can recall arguing a case in the court of appeals where the judge asked the Government's attorney about a certain case which I had cited which I said was dispositive in my brief, and

the lawyer responded that he hadn't read the case. Now, this, at the court of appeals, is a bit awkward. Nonetheless, the Government won the case.

I just don't think that the system of advocacy that we now have would bear up under a system which would require even a greater burden of participation in the court of appeals. I would much rather see the court of appeals knowingly given a little more discretion as to what it can do with present records and present matters; somewhat freed from the chains that the Supreme Court has imposed upon the court of appeals. I would rather see that, because I think the bar can cope with the present system better, and I don't think it's quite necessary to make the government prove every fact or every finding at the court of appeals level.

Senator HEFLIN. All right, gentlemen. Well, we appreciate your testimony here today.

We appreciate your being here. It has been an interesting 2 days of hearings, and I think we will pursue it further. I guess we can get into, in effect, a judicial system which is even more complicated than the system that has evolved over the years in the United States. So it seems to me that it needs a lot of careful study.

Thank you very much for being here.

[Whereupon, at 1:10 p.m., the hearing was adjourned.]

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